(31) (30)

Nos. 91-744 and 91-902

FILED
APR 6 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respendents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN ACADEMY OF MEDICAL ETHICS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS ROBERT P. CASEY *et al.*

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April 6, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUMMARY OF ARGUMENT

In order to determine the proper standard of review with which to judge the Pennsylvania statutes in issue in this case, the Court must reconsider the continuing validity of *Roe v. Wade*, 410 U.S. 113 (1973), as the source of the standard. The majority in *Roe*, following established traditions of constitutional interpretation, analyzed the case through extended discussion of the history of abortion laws. Influenced by deliberately distorted presentations of that history, the Court erroneously concluded that abortion was not a common law crime. The Court's historical errors caused it to break sharply with the traditional values of the common law and our Constitution.

The historical record shows that abortion and other killings of unwanted children were condemned by all respected legal authorities in England from the start of the common law, and those laws were applied with full rigor in the United States during the colonial era. Early on, infanticide was frequently punished; when, with new medical technologies, abortion became more common than infanticide, legal institutions turned their attention from infanticide to abortion.

The common law has always socially controlled abortion in the interest of mother and child, interests that changed as medical technologies developed. Changing abortion technologies affected the desire of some mothers for the procedure while developing medical knowledge reinforced a growing certainty that a conceptus is a person from early stages of gestation, leading to a widely shared consensus in the nineteenth century on the moral worth of the unborn child. The consensus was then shared by even the most militant feminists and opposed only by professional abortionists.

Legislatures are better at assembling the information necessary to assess the import of the changing technologies and at balancing the interests created or reinforced by those technologies. Courts are ill-suited to be boards of review for the implications of changing medical technologies. In the present flux, recourse to states as labora-

tories for social policies is particularly appropriate. The Court should uphold all provisions of the Pennsylvania statute and should overrule *Roe v. Wade*.

ARGUMENT

I. THE CONSTITUTIONAL STATUS OF ABORTION MUST BE DETERMINED BY EXAMINING THE DEEPLY-ROOTED TRADITIONS OF ANGLO-AMERICAN SOCIETY AS EMBODIED IN THE COMMON LAW AND THE CONSTITUTION

The rule of law requires judicial decisions to have a basis other than the judge's personal predilections. We find that basis in historical traditions regarding the relevant behavior. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991); *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-05 (1819). Even those who reject the original intent as controlling constitutional interpretation have sought to anchor constitutional decisions in evolving national traditions.[1] Only by denying the relevance of anything other than one's own personal vision of a better society can one deny the relevance of historical traditions to constitutional interpretation.

The historical record on abortion is sparse, but the record is clear that abortion and other killings of unwanted

[1] See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592, 595-97 (1977): A. Bickel, *The Least Dangerous Branch* 109-10 (2d ed. 1986); L. Tribe & M. Dorf, *On Reading the Constitution* 13-19, 33, 52-53, 59-60, 70-71, 97-99 (1991). Appeal to an aspirational tradition is at least implicit in appeals to community for social and legal norms if the "community" appealed is to refer to any actual community, as opposed to an "ideal community" wholly a product of one's own imagination. *See, e.g.*, R. Dworkin, *Law's Empire* (1986); Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 Yale L.J. 1013 (1984); R. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986); P. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1 (1989). *See also* O. W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897): "Law is the witness and external deposit of our moral life."

children were always prohibited in the common law tradition, and, as this Court itself recognized in *Roe v. Wade*, 410 at 159, abortion has always been and now is treated differently from other issues of reproductive privacy. Because of this difference, the precise historical tradition toward abortion alone is relevant to the constitutional power of states to regulate or prohibit abortion.

II. *ROE v. WADE*, THROUGH ERRONEOUS READING OF THE HISTORICAL STATUS OF ABORTION UNDER THE COMMON LAW, BROKE SHARPLY WITH THE TRADITIONAL VALUES OF THE COMMON LAW AND OUR CONSTITUTION

More than half of the majority opinion in *Roe*, 410 at 129-152, 156-162, was given to a history of abortion, used to inform the values at stake in the controversy. The majority concluded that "it now appear[s] doubtful that abortion was ever . . . a common law crime", 410 U.S. at 136, and that American abortion statutes were not generally adopted until after the Fourteenth Amendment was adopted, *id.* at 139. Both conclusions are wrong.

Extensive research since *Roe* has found indictments or appeals of felony for abortions dating back eight centuries.[2] This evidence indicates that abortion, even before quickening, was a crime at common law, a conclusion that was unquestioned (at least for abortions after quickening) until abortion activists adopted a deliberate strategy of challenging it. The nineteenth-century abor-

[2] Many of the indictments and appeals cited in this brief have not been published except as appendixes to briefs similar to this. In addition to my research, Mr. Philip Rafferty of the Los Angeles bar made his extensive research available, as have Dr. J.H. Baker of Cambridge University and Dr. John Keown of the University of Leicester. *See generally* J. Keown, *Abortion, Doctors and the Law* (1988). Dr. Baker's text, *An Introduction to English Legal History* (3d ed. 1990), is a leading text on the topic.

tion statutes served to affirm social policy in the face of technologically-based social change.

A. Courts, from *Roe v. Wade* on, Have Relied on a Deliberately Distorted History of Abortion

The majority in *Roe* relied uncritically on the work of Cyril Means, Jr., who was then general counsel for the National Association for the Repeal of Abortion Laws (NARAL, now the National Abortion Rights action League).[3] Means' distorted doctrinal history of abortion precedents and statutes ignored the larger social and technological context in which those decisions were grounded.[4] Abortion advocates now usually rely on the work of historian James Mohr, as expressed in the "Historians' Briefs" in *Webster v. Reproductive Health Services* and in this case.[5]

These histories of abortion are advocacy pieces with a highly selective examination of the evidence to support a partisan and distorted history of abortion. Mohr and the authors of the "Historians' Briefs" view the law of abor-

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[3] C. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) ("Means II"); C. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) ("Means I"). The majority cited Means seven times for the history of abortion—without noting that he was the NARAL's general counsel. On Mean's relation to abortion advocacy groups, see M. Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* 289-92, 297-98 (1988).

[4] *See generally* J. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979).

[5] J. Mohr, *Abortion in America* (1978); *Amicus* Brief of 281 American Historians, *filed in* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) ["*Webster* Brief"]; *Amicus* Brief of 250 Historians, *filed in* Planned Parenthood of S.E. Pa. v. Casey ["*Casey* Brief"].

tion as a story of oppressors and oppressed, shifting their focus from the increasingly clear history of the law of abortion to less determinate questions of the "true" social attitudes toward abortion in our history. Their project of recovering "lost voices"[6] enables them to discount attitudes with which they disagree as aberrations, not truly representative statements, either in favor of similar records of more agreeable attitudes or in favor of presumed but unrecorded opinions of historically mute classes. Their story of oppression is far from a complete history.

Recovering "lost voices" permits one to infer, at will, what the "true" attitudes were. Yet, if the public attitudes of formal, legal institutions did not represent the true values of our society, why did those institutions express themselves in such terms, and why did those unrepresentative terms continue through major changes in social and political structures spanning more than seven centuries? Nor does the "lost voices" project recognize that the Constitution is a legal document. Ultimately, legal traditions must inform the Constitution: Social, medical, and moral contexts usefully illuminate legal traditions, but they are not an independent source of right. Finally, troubling public admissions by the authors of the *Webster* Brief of deliberate distortions of the historical record to achieve more effective advocacy emphasizes the shallowness of their arguments.[7]

Sylvia Law, Counsel of Record on the *Webster* Brief, candidly lamented the authors' "serious deficiencies as truth-tellers."[8] James Mohr does not "consider the brief to be history, as I understand the craft."[9] His-

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[6] *See* Casey Brief, *supra* note 5, at 4. *See also* Law, *Conversations Between Historians and the Constitution*, 12 The Pub. Historian 11, 14 (1990).

[7] *Cf.* A. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 n.13, 144 (decrying "law office history").

[8] Law, *supra* note 6, at 14-16.

[9] J. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the* Webster *Process*, 12 The Pub. Historian 19, 25 (1990).

torian Estelle Freedman, who also worked on the brief, signed the brief despite knowing that her own research demonstrated a very different story, explaining her decision in a passage of remarkable frankness:

> As an historian, my primary difficulty with the earlier versions of the brief had to do with the selective view of evidence, or lack of evidence, to show continuity rather than change, in order to support a particular legal argument about original intent. . . . Yet I realize that for the practical purposes of writing this brief, it was necessary to suspend certain critiques to make common cause and to use the legal and political grounds that are available to us. . . .[10]

The difficulties these admissions present are not resolved simply by asserting, as do the other two lawyers on the *Webster* Brief, that all discourse is necessarily political and that any distinction between scholarship and distortion is illusory.[11] The "Historians' Brief" filed in this case (the "*Casey* Brief") was written by the same attorneys relying on the same historians with only small changes of emphasis. The Historians' Briefs hinge on the twin claims that abortion has always been a common social practice and was a "common law liberty" prior to the Civil War—both of which are demonstrably false.

B. In England, from the Beginning of the Common Law, Courts and Other Respected Authorities Consistently Condemned Abortion

Common law indictments and appeals of felony for abortion are recorded as early as 1200. While the terse records often do not indicate the outcome of the pro-

[10] E. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the* Webster Amicus *Brief*, 12 The Pub. Historian 27, 32 (1990). Her entire talk makes clear that the problems she addressed were not resolved in the version filed with the Court.

[11] Larson & Spillenger, *"That's Not History": The Boundaries of Advocacy and Scholarship*, 12 The Pub. Historian 33 (1990).

ceedings,[12] the many clear records of punishment[13] and judgments of "not guilty" (rather than dismissal)[14] prove that the indictments and appeals were valid under the common law. Means was simply wrong to assert that

[12] *R. v. Cokkes* (1415), 7 Calendar of Inquisitions Misc. (Ch.) Pres'd in the Pub. Rec. Off. 1399-1422, at 296 (no. 523) (1968); *R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414, at 57-58 (no. 24) (1959); *R. v. Houdydoudy* (Coroner's Inquest 1326), Calendar of Coroner's Rolls of the City of London A.D. 1300-1378, at 166 (1913); *R. v. Botevylayn* (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306, at 105, 126, 131 (nos. 576, 800, 854) (1978); *Boleheved's Appeal*, JUST 1/112, m.9d (Cornwall Eyre 1284); *R. v. le Petiprestre*, The London Eyre of 1244, at 48 (no. 116) (London Rec. Soc'y 1970); *Sauter's Appeal*, Pleas of the Crown for Gloucester Cnty. 1221, at 16 (no. 69) (1884); *Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes's Appeal* (1200), 1 Selden Soc'y, *supra* at 39 (no. 82) [see App. C, at 12a].

[13] HANGING: *R. v. Haule*, JUST 1/547A, m.20d (London Eyre 1321) [see App. C, at 15a]; *R. v. Kyltavenan* (Cork, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 193 (Dublin Stationary Off., n.d.). IMPRISONMENT: *R. v. Code*, JUST 1/789, m.1 (Hampshire Eyre 1281) [see App. C, 14a]. OUTLAWRY: *R. v. Ragoun*, JUST 1/547A, m.55d (London Eyre 1310); *R. v. Eppinge*, JUST 1/547A, m.46 (ms. dated 1321) (London Eyre 1304); *R. v. Hervy*, JUST 1/547A, m.40d (1300, ms. dated 1321); *R. v. Hokkestere*, JUST 1/547A, m.3 (London Eyre 1298, ms. date 1321); *R. v. Scot*, JUST 1/547A, m.22 (1291, ms. dated 1321); *R. v. Dada*, JUST 1/547A, m.19d (1290, ms. dated 1321); *R. v. Cliston*, JUST 1/1011, m.62 (Wiltshire Eyre 1288); *R. v. Mercer*, JUST 1/710, m.45 (Oxford Eyre 1285) [see App. C, at 14a]; *R. v. Brente*, JUST 1/186, m.30 (Devon Eyre 1281); *R. v. Code*, JUST 1/789, m.1 Hampshire Eyre 1281) [see App. C, at 14a]; *R. v. Scharp*, The London Eyre of 1276, at 23 (no. 76) (London Rec. Soc'y 1976); *Juliana's Appeal* (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (1897) [see App. C, at 13a]; *Erneburga's Appeal*, JUST 1/175, m.38 (1249). *See also Leges Henri Primi* ch. LXX.14 (L.J. Downer ed. 1972) (a 12th-century compilation of Anglo-Saxon law as modified by the early Norman kings).

[14] *R. v. Mondson*, JUST 1/527, m.11d (Lincolnshire Gaol Delivery 1361-62); *R. v. Skotard*, JUST 1/169, m.25 (Derbyshire Eyre 1330); *R. v. Cobbeham*, JUST 1/547, m.19d (London Eyre 1321); *R. v.*

only two cases dealt with abortion before 1600 and that the courts in both cases doubted whether abortion was a crime: *R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327); and *R. v. Anonymous* (K.B. 1348), Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) [see App. C, at 16a].

Godesman, JUST 1/383, mm.18d, 96 (Kent Eyre 1313); *R. v. le Raggede* (Dublin, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 216 (Dublin Stationary Off., n.d.); *Rokaf's Appeal*, JUST 1/544, m.55d (Middlesex Eyre 1294); *R. v. Skel*, JUST 1/1098, pt.2, m.79 (Yorkshire Eyre 1293); *R. v. Wyntercote*, JUST 1/303, m.69d (Hereford Eyre 1292); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292); *R. v. Hore*, JUST 1/1011, m.56 (Wiltshire Eyre 1289); *Agnes's Appeal*, JUST 1/1011, m.59d (Wiltshire Eyre 1289); *R. v. Reeve*, JUST 1/924, m.60 (Sussex Eyre 1288); *R. v. Neubyr'* JUST 1/924, m.73 (Sussex Eyre 1288); *Beatrix's Appeal*, JUST 1/579, m.10d (Norfolk Eyre 1286); *Mill's Appeal*, JUST 1/579, m.72 (Norfolk Eyre 1286); *la Neweman's Appeal*, JUST 1/833, m.7 (Suffolk Eyre 1286); *Alexandra's Appeal*, JUST 1/833, m.23d (Suffolk Eyre 1286); *Hervest's Appeal*, JUST 1/789, m.26d (Hampshire Eyre 1281); *R. v. Benetley*, JUST 1/789, m.3 (Hampshire Eyre 1281); *de Pekering's Appeal*, JUST 1/369, m.36 (Kent Eyre 1279); *R. v. le Gaoeler*, JUST 1/369, m.37d (Kent Eyre 1279); *R. v. Surgeon*, JUST 1/369, m.37d (Kent Eyre 1279); *Joan's Appeal*, JUST 1/921, m.23 (Sussex Eyre 1279); *Gras's Appeal*, The London Eyre of 1276, at 73-74 (no. 261) (London Rec. Soc'y 1976); *Sorel's Appeal*, The London Eyre of 1276, at 61 (no. 222); *Isabel's Appeal*, The London Eyre of 1276, at 62-64 (nos. 157, 158); *Cecily's Appeal* (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981); *Swayn's Appeal*, JUST 1/359, m.36 (1249); *Margaret's Appeal*, JUST 1/174, m.40d (1249?); *Orscherd's Appeal*, JUST 1/174, m.40d (1249?); *Alice's Appeal*, JUST 1/176, m.27d (1249); *Amice's Appeal*, JUST 1/274, m.14d (1247) [see App. C, at C—]; *Phina's Appeal*, JUST 1/778, m.57 (1246), summarized in Meekings *supra* at 267; *Sarah's Appeal*, The London Eyre of 1244, at 50-51 (no. 124) (London Rec. Soc'y 1970); *St. Alban's Appeal* (1244), The London Eyre of 1244, at 36 (no. 84); *Modi's Appeal* (1221), 59 Selden Soc'y 560-61 (no. 1336) ((1940); *Burel's Appeal* (1202), 1 Selden Soc'y 11 (no. 26) (1887). BENEFIT OF CLERGY PRECLUDED TRIAL: *Mabel's Appeal*, JUST 1/741, m.33 (Shropshire Eyre 1292) (damaged roll); *Philippa's Appeal* (1276?), The London Eyre of 1276, at 51 (no. 187).

Means (and the *Roe* majority) relied on a faulty text of *R. v. de Bourton* [see App. B, at 2a]. Even their faulty text did not support Means' highly partisan analysis of the case.[15] The faulty text of *R. v. de Bourton* at most demonstrates that courts declined abortion prosecutions if uncertain whether the case was properly before the court for reasons other than the criminality of abortion. The defendant was charged with beating a woman, causing one twin to be born dead and the other to die shortly after birth; the defendant apparently was released on bail to answer for an unspecified different charge. The full record reveals the case actually to have been a dispute over whether the offense was bailable, and not over its criminality. In the end, de Bourton was pardoned; the charges were not dismissed.

In *R. v. Anonymous*, the defendant escaped conviction for killing a child in the mother's womb for the dubious reason that the indictment failed to state a baptismal name for the victim,[16] and because it was impossible to know if the defendant had killed the child. In both *de Bourton* and *Anonymous*, the issues were procedural and evidentiary, not substantive. Early commentators on the common law also declared abortion after quickening to be criminal homicide. 2 H. de Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); 1 *Fleta* 60-61 (Selden Soc'y ed. 1955).[17]

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[15] Keown, *supra* note 2, at 4; S. Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. Leg. Hist. 20, 22-29 (1984). Dellapenna, *supra* note 4, at 368-70.

[16] "Murder", at least until 1340, meant a fine imposed on a district when no one could prove a deceased's identity as an Englishman. 1 W. Holdsworth, *A History of English Law* (1938), at 65-77, 580-632; 1 F. Pollock & F. Maitland, *The History of English Law Before the Time of Edward I* 67-68, 545 (2d ed. 1898); 2 Pollock & Maitland at 480-86. This usage was still common in the Inns of Courts nearly two centuries later. *See* Selected Readings on the Law of Murder, in App. C, at 16a.

[17] Britton disagreed because of the lack of a baptismal name for the victim. 1 *Britton* 114 (F.M. Nichols ed. 1865).

The sixteenth-century cases clearly held voluntary abortions to be crimes. A coroner's inquest held death by abortion to be "felonious suicide"; the man involved was released as an accessory then could not be tried without the principal. *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505) [see App. C, at 18a].[18] A man died before trial for providing a potion to induce an abortion. *R. v. Wodlake*, K.B. 9/513/m.23 (1530), K.B. 29/162/m.11d (1531) [see App. C, at 19a]. Accusing a woman of offering abortifacients to another supported an action for slander as such words were sufficient grounds to require a judicial bond for good behavior. *Cockaine v. Witnam* (1577), Cro. Eliz. 49 (1586) [see App. C, at 21a]. A woman was executed for abortion by witchcraft. *R. v. Turnour*, Assize 35/23/29 (Essex 1581) [see App. C, at 22a].[19] A woman was "presented" by a coroner's jury for procuring her own abortion. *R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589).

Two sixteenth-century writers on criminal pleadings denied, however, that abortion was a felony. 1 W. Staunford, *Pleas of the Crown* ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the Peace* 217-218 (1st ed. 1581). Yet a formbook, with four editions from 1506 and 1544, included a form indictment for abortion by physical assault on the mother. *Boke of the Justyces of the Peas* ch. vi, fol. iii (1515). Perhaps Staunford and Lambard reflected the inconclusiveness of the more widely, albeit faultily, reported decisions; or perhaps they meant that abortion was a crime less than a felony or that abortion properly belonged before a court other than the Queen's Bench. They clearly were wrong.

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[18] *See also R. v. Wynspere*, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434, 12; Keown, *supra* note 2, at 6.

[19] The record is not entirely clear as to why she was executed; Turnour was convicted of several acts of witchcraft, only one of which involved abortion, but the abortion was the only witchcraft which would have been a capitol offense. *See* Calendar of Assize Rec., Essex Indictments, Eliz. I, at 212 (no. 1225) (J. Cockburn ed. 1978).

Sixteenth-century legal activity directed at abortion did involve the secularization of ecclesiastical jurisdiction.[20] Ecclesiastical judicial activity directed at abortion declined during the Reformation and common law courts then took full responsibility for abortion.[21] In 1601, two Justices of the Queen's Bench held an abortion in which a child dies after its live birth to be murder on grounds that the birth and subsequent death of the child permitted proof of the cause of death. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601) [see App. C, at 23a].[22] In

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[20] *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); Keown, *supra* note 2, at 5; Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-81 (1975). Ecclesiastical and legal jurisdiction often were concurrent. Keown, *supra*; Helmholz, *supra* at 386. In English legal theory both temporal and ecclesiastical courts derived their authority from the Crown, and thus both together represented the "law of England." 1 M. Hale, *History of the Pleas of the Crown*, preface (1736). Many modern bodies of law that today are unquestionably secular originated in ecclesiastical courts, including wills, slander, and simple contracts. 1 Holdsworth, *supra* note 16, at 65-77, 455-57, 580-632 (1938); 3 Holdsworth at 408-28, 441-54, 534-36; 5 Holdsworth at 167-69, 197-218, 291-99; 8 Holdsworth at 301-07, 423-417; 15 Holdsworth at 198-208; Dellapenna, *supra* note 4, at 382-87.

[21] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979). Witchcraft became an indictable crime by the statute of 5 Eliz. I, ch. 15 (1573); within eight years we find *R. v. Turnour, supra*.

[22] Failure of proof was occasionally given as a reason for not prosecuting earlier indictments. On the primitive state of forensic medicine even three centuries later, *see* Forbes, *Early Forensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981). *R. v. Sims* seems to have settled the matter: *R. v. Senior*, 168 Eng. Rep. 1298 (K.B. 1832); *R. v. Lewis*, OB/SP/April 1786, nos. 67, 86 (K.B. 1786). *Sims* was an action in trespass, which then was still a hybrid action combining criminal and civil elements; for the evolution of medieval trespass into modern crimes and torts, *see* 2 Holdsworth, *supra* note 16, at 364-65: 3 Holdsworth, at 317-18, 609-11: 4 Holdsworth at 512-15; 2 Pollock & Maitland, *supra* note 16, at 510-24.

1602, in *R. v. Webb*, Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980) [see App. C, at 24a], a woman apparently was saved from punishment for self-abortion only by a general pardon. The pardon covered entire classes of felony; whether the pardon was before or after her conviction is unclear. Finally, Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide. *R. v. Anonymous* (Bury Assizes 1670), M. Hale, *History of Pleas of the Crown* 429-30 (1736) [see App. C, at 25a].[23]

Sir Edward Coke had argued *R. v. Sims* as Attorney-General and took the case up in his *Third Institute* 50-51 (1644) [see App. C, at 25a], generalizing from it a principle that abortion after quickening was "a great mis-

[23] There were many other 17th-century cases. MISDEMEANOR CONVICTIONS: *R. v. Hallibred*, ERO (Chelmsford) O/S/R 236/102 (1622), 19B Calendar of Essex Cnty. Rec. 1611-1624, at 474 (no. 102); *R. v. Berry*, MJ/GSR/SF79 (1617), 4 (N.S.) Cnty. of Middlesex Calendar of the Sess. Rec. 1615-1616, at 292; *R. v. Rastone*, MJ/SR/552/135 MJ/SBP/1, f. 75 (Middlesex 1616), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 277; *R. v. Whalley*, MJ/SR/552/136 (1616), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 277; *R. v. Robinson* (Middlesex 1615), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 175. ACQUITTALS: *R. v. Squire*, Gaol Del., ref: MJ/SR/1720 (1687); *Commonwealth v. Carter* (1652), Calendar of Assize Rec.: Kent Indictments, 1649-1659, at 96 (nos. 534, 535) (1989). INDICTMENTS WITHOUT RECORD OF THE OUTCOME: *R. v. Willson*, ERO (Chelmsford) QSR/459/1 (1688), 25 Calendar of Essex Cnty. Quarter Sess. Rec. 30; *R. v. Rolfe*, ERO (Chelmsford) QSR/405/64, 160, 184, QSR/406/43, 110, 112-13 (1665), 23 Calendar of Essex Cnty. QSR 65, 74, 76; *Commonwealth v. Simpson* (1659), 6 N. Riding Q. Sess. Rec. 23 (1888); *Commonwealth v. Foxall* (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50; *R. v. Lagott*, SRO (Somerset) Q/S 62 (1629), 2 Quarter Sess. Rec. for the Cnty. of Somerset, Charles I, 1625-1639, at 228 (no. 16); *R. v. Fookes*, ERO (Chelmsford), Q/S/R 222/73 (1618), 19 Calendar of Essex Cnty. Rec., *supra*, at 328 (no. 73); *R. v. Hodges* (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615, at 345 (1936); *R. v. Turner*, MJ/SR/543/143 (f. MSR 111.51), MJ/SR/544/44, MJ/SBR/2 (1615), 3 (N.S.) Cnty of Middlesex Calendar, *supra*, at 51.

prision [serious misdemeanor], and no murder" if the child died in the womb, and murder if the child died after its birth. Coke's proposition was accepted virtually without question.[24] Neither Coke nor Hale cited the precedents available for their conclusions.[25] Means dis-

[24] Coke, often called the "Father of the Common Law," was followed relative to abortion by: 1 W. Blackstone, *Commentaries* 129-30 (1765); 4 Blackstone 198 (1769); R. Burn, *The Justice of the Peace and the Parish Officer* 380 (3d ed. 1756); 1 E. East, *A Treatise on the Pleas of the Crown*, 227-30 (1803); M. Hale, *Pleas of the Crown* 53 (1678); 1 W. Hawkins, *Treatise on the Pleas of the Crown* 80 (1716); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 617-18, 796 (1819). Two books are attributed to Hale, one that echoed Coke's views and a later book, Hale, *supra* note 20, at 433 [see App. D, at 26a], that denied that an abortion-induced death of a child born alive is murder. Which view truly represents Hale's opinion cannot now be established. On Coke's life and stature, see Baker, *supra* note 2, at 125-26, 164-69, 210, 217-18.

[25] PRECEDENTS FOR *R. v. Sims*: *R. v. Cokkes* (Somerset 1415) (outcome unknown), 7 Calendar of Inquisitions Misc. (Ch.) Pres'd in the Pub. Rec. Off. 1399-1422, at 296 (no. 523) (1968); *R. v. Portere* (K.B. 1400) (convicted), The Shropshire Peace Role 1400-1414, at 57-58 (no. 24) (1959); *R. v. Eppinge*, JUST 1/547A, m.46 (London Eyre 1321) (convicted); *R. v. Scot*, JUST 1/547A, m.22 (London Eyre 1321) (convicted); *R. v. Haule*, JUST 1/547A, m.20d (London Eyre 1321) (convicted) [see App. C, at C—]; *R. v. Dada*, JUST 1/547A, m.19d (London Eyre 1321) (convicted); *R. v. Cobbeham*, JUST 1/547A, m.19d (London Eyre 1321) (acquitted); *R. v. Skel*, JUST 1/1098, pt. 2, m.79 (Yorkshire Eyre 1293) (conviction); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292) (acquitted); *Agnes's Appeal*, JUST 1/1011, m.59d (Wiltshire Eyre 1289) (appeal of felony not permitted if infant born alive; *R. v. Hore*, JUST 1/1011, m.56 (Wiltshire Eyre 1289) (acquitted); *R. v. Cheney*, JUST 1/323, m.47d (Hertfordshire Eyre 1278) (trespass for accidentally killing child in the womb; child died after live birth). PRECEDENTS FOR *Hale's R v. Anonymous: Commonwealth v. Carter* (1652), Calendar of Assize Rec.: Kent Indictments, 1649-1659, at 96 (nos. 534, 535) (1989) (acquitted); *R. v. Adkyns*, ASS. 35/43/1, m.1 (1600) (convicted), reprinted in Calendar of Assize Rec., Essex Indictments, Eliz. I, at 510 (no. 3054) (1975); *R. v. Meddowe*, Ass. 35/32, m.34 (1591) (convicted), Calendar of Assize Rec., Sussex Indictments, Eliz. I, at 233 (no. 1212) (1975); *R. v. Poope* (1589) (convicted), Calendar

missed Coke's statement on abortion as a "masterpiece of perversion," he found Hale's decision to be "an act of Restoration gallantry." [26] Means did not explain how to recognize the difference.

C. English Law Always Prohibited Parents from Killing Unwanted Children, and Parliament and the Courts Took Strong Steps, Gradually Strengthened over Centuries, to Punish Such Acts

Most cases before 1700 involved crude physical batterings of the mother—often to her serious injury or death (injury techniques).[27] The remaining abortions were induced by "noxious potions" that were nearly as deadly as the batterings (ingestion techniques).[28] One might

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of Assize Rec., Kent Indictments, Eliz. I, at 289 (no. 1751) (1975); *R. v. Skotard*, JUST 1/169, m.25 (Derbyshire Eyre 1330) (acquitted); *R. v. Houdydoudy* (Coroner's Inquest 1326) (outcome unknown), Calendar of Coroner's Rolls of the City of London, A.D. 1300-1378, at 166 (1913); *R. v. Godesman*, JUST 1/383, mm.18, 96 (Kent Eyre 1313) (acquitted); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292) (acquitted); *R. v. Cliston*, JUST 1/1011, m.62 (Wiltshire Eyre 1288) (convicted); *R. v. Reeve*, JUST 1/924, m.60 (Sussex Eyre 1288) (convicted); *R. v. Brente*, JUST 1/186, m.30 (Devon Eyre 1281) (convicted); *Philippa's Appeal*, London Eyre of 1276, at 51 (no. 187) (London Rec. Soc'y 1976) (benefit of clergy; defendant not tried); *Orscherd's Appeal*, JUST 1/174, m.40d (1249?) (acquitted).

[26] Means II, *supra* note 3, at 359, 363.

[27] Injury techniques ranged from ineffective simple bodily maneuvers to savage assaults, such as cutting the mother and removing the infant.

[28] Appeals or indictments for abortion by potion might have been rarer than for abortion by assault because a potion was part of a magic ritual punishable as witchcraft even if ineffective, but only by an ecclesiastical court before Elizabeth I. Among traditional cultures, anthropologists have found injury techniques to be most common—because of the likelihood of success, G. Devereux, *A Study of Abortion in Primitive Societies* 30-35, 171-358 (1955). *See also* J. Bates & E. Zawadski, *Criminal Abortion* 87-88 (1964); A. McLaren, *Reproductive Rituals* 100-08 (1984); F. Taussig, *Abortion Spontaneous and Induced* 41-45 (1936).

therefore infer that the law was protecting maternal life or health—if one assumes that abortion was always available through relatively safe means.[29] Ingestion and injury techniques then used could be effective only with intense pain and at the risk of death or permanent injury; undergoing either cannot have been popular.[30] Voluntary abortions, abortions that were not crimes against the mother, were rare when the techniques available were tantamount to suicide.[31]

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[29] Mohr, *supra* note 9, at 6-19, lists various methods that he assumed were safe and effective, yet research shows that his assumption was unfounded; even he acknowledged the poisonous nature of at least some of the his "abortifacients", *id.* at 9, 21-22, 55-58, 71-73. For another historian who also assumed that workable techniques existed while recognizing that his own catalogue included only the useless or the fatal, see E. Shorter, *A History of Women's Bodies* 177-191 (1982). Other historians have made the same assumption on even less evidence. A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* 67 (1982); L. Gordon, *Women's Body, Women's Right: A Social History of Birth Control in America* 35-39 (1976); McLaren, *supra* note 28, at 5-7, 107, 111-112; R. Petchesky, *Abortion and Women's Choice* 27-34 (1984); G. Quaife, *Wanton Wenches and Wayward Wives* 118-120 (1979). *See also infra* note 30.

[30] Shorter, *supra* note 29, at 177, concluded that before 1880 only the truly desperate would risk abortion. Quaife describes injury techniques with his analysis of violence, and not with abortion, while conceding that girls were rarely anxious to use ingestion techniques. Quaife, *supra* note 29, at 26, 118. *See also Gordon, supra* note 29, at 39; Petchesky, *supra* note 29, at 30, 49-55.

[31] Devereux, *supra* note 28, at 149-150. *See generally* Dellapenna, *supra* note 4, at 372-76, 393-95. One study of the incidence of abortion in the earlier times, based on church records which do not distinguish between spontaneous and induced abortions, P. Laslett, *The World We Have Lost* 123 (1966), found that abortions in 17th century England amounted to 6-7% of total births; as spontaneous abortions in the 20th century range from 7.5-11% with our more advanced medical technology, *id.* at 266, 17th century figures reveal few, if any, induced abortions. Some assertions in legal proceedings that a potion was given by trick, etc., might have been dissimulation by the mother; this seems unlikely for abortion by savage physical attack.

The unpopularity of injury techniques with women hardly needs demonstration. And, while we cannot know all potions available in medieval England, surveys of the medical literature there and in medically similar societies show that the potions ingested for an abortion were either ineffective (except for possible placebo effects) or highly dangerous.[32] Savin was the "abortifacient" most widely reported in medieval English sources; modern tests have shown that it works by undermining the woman's health generally so she cannot sustain the pregnancy, all too often enfeebling her to the point of death.[33] Perhaps this is why in early English slang "poisoned" meant pregnant![34]

Possibly a safe and effective drug escaped all notice in the legal, medical, and popular literature of the day. Yet

[32] Bates & Zawadski, *supra* note 28, at 14-23, 85-91; Devereux, *supra* note 28, at 36-43, 249, 279; N. Himes, *Medical History of Contraception* 139-151 (1936); J. Noonan, *Contraception* 222-230 (1965); Shorter, *supra* note 29, at 179-188; Taussig, *supra* note 28, at 31-45, 352-357; Dellapenna, *supra* note 4, at 373-376. Ineffective "abortifacients" included goat dung, raw eggs, hops, "ungrateful strong smells", and wine. Drugs, the ingestion of which in dangerous quantities could bring on an abortion, included caster oil, ergot of rye, hellebore, pennyroyal, rue, savin (juniper), tansy tea, thyme, and yarrow. A sufficiently desperate woman could ingest (or be made to ingest) a substance lethal even in small quantities, such as aloes, arsenic, ratsbane (rat poison), snake venom, and various metallic salts. Nineteenth-century courts were well aware of the dangers these potions still posed. *See, e.g., Commonwealth v. W.M.W.*, 3 Pitt. Rep. 462 (1871); *Moore v. State*, 49 S.W. 287 (Tex. Crim. 1897).

[33] One modern study found that savin induced an abortion in 10 of 21 women who consumed it: 9 of the 10 "successful" one died, as did 4 of the "unsuccessful" ones. Taussig, *supra* note 28, at 353. In fact, most modern poisons were discovered in a vain search for safe dosages of "abortifacients." Bates & Zawadski, *supra* note 28, at 88. For a graphic description of a savin death, *see* Forbes, *supra* note 22. *See generally* Mohr, *supra* note 5, at 71-73: Gordon, *supra* note 29, at 37; Shorter, *supra* note 29, at 186-188. *See also* J. Weeks, *Sex, Politics and Society* 72 (1981) (lead-poisoning "epidemic" because of its use as an abortifacient).

[34] F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785).

the Arabic medical texts which in Latin translation were standard medical references in the later middle ages described no technique safer or more effective, and later works in English add nothing significant.[35] Given the general lack of inventiveness of pre-scientific societies, the lack of variation in abortion techniques over six centuries is hardly surprising.

Singularly lacking is any mention of "intrusion techniques"—techniques involving intruding an instrument through the cervix into the uterus to induce abortion. With only primitive knowledge of women's reproductive anatomy,[36] intrusive intervention can rarely have been successful. The closest one finds to an intrusion technique are "pessaries"—vaginal suppositories, uually laced with "abortifacient drugs," that did not penetrate the

[35] ARABIC TEXTS: Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595); Rhazes, *Liber ad Almansorem* (1497); Himes, *supra* note 32, at 139-151. ENGLISH TEXTS: 1 *Compleat Herbal* 69-71, 94-95 (G. Swindells ed. 1787); M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* 563 (3d ed. 1712); J. Pechey, *Compleat Herbal of Physical Plants* 13 (1707). The texts also describe "abortifacient" effects in markedly different terms from other pharmacological effects: "Abortifacient" effects are always introduced with phrases such as "it is said," suggesting either uncertainty about the efficacy of the potion or unwillingness to be thought to favor the practice. McLaren, *supra* note 28, at 103-104, 123; Noonan, *supra* note 32, at 201-207, 217.

[36] Not only were potions often given in a belief that a woman had blocked menses rather than pregnancy, but potions were sometimes given to prevent a uterus from rising in a woman's body to her throat to choke her! Shorter, *supra* note 29, at 286-287. Shorter, *supra* at 188-191, conceded that instrumental abortions were not a realistic possibility before the 19th century. *See also* Devereux, *supra* note 28, at 28, 36-37. Gordon, *supra* note 29, at 37-38, believes intrusion techniques are of ancient lineage, but is reduced to asking her readers to disregard part of a long description of an Eskimo intrusion technique when the informant tells us that the purpose was to puncture the uterus.

cervix. Without penetration, however, pessaries were not effective.[37]

Many still believe that medically primitive cultures, including medieval England and colonial America, had mysterious abortion techniques that were safe and effective. If so, why would such folk medicines abruptly disappear in the nineteenth century in favor of highly dangerous intrusion techniques that supposedly made abortion so dangerous as to justify the statutes proscribing abortion? The answer is that before the nineteenth century, traditional forms of abortion had been infanticide and abandonment.[38]

Infanticide was a frequent crime when abortion was still rare.[39] Royal courts actively punished those convicted of infanticide and denied benefit of clergy to one accused of the crime. *R. v. Parker*, 73 Eng. Rep. 410 (1580). The earliest known regulations of midwives (1512) were adopted to prevent the killing of infants.[40] Parliament enacted ever more stringent statutes pro-

[37] Devereux, *supra* note 28, at 37; McLaren, *supra* note 28, at 101-102; Taussig, *supra* note 28, at 355-356.

[38] M. Kenny, *Abortion: the Whole Story* 181 (1986).

[39] One early book (ca. 1300) stated that infanticide within one year of birth was cognizable only by ecclesiastical courts, *Mirror of Justices* 139 (Selden Soc'y 1895). 2 Pollock & Maitland, *supra*, note 16 at 478 n.1, dismissed this book as worthless. Staunford, *supra* at ch. 13; and Lambard, *supra* at 217-18, cited a 1315 conviction as indicating that infanticide was a common law felony (in the same passages where they denied that abortion was a common law felony). Dead babies remained a common sight in London streets into the 19th century. C. H. Rolph, *A Backward Glance at the Age of 'Obscenity'*, 32 Encounter 23 (June 1969). *See also* J. Boswell, *The Kindness of Others: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1989); Gordon, *supra* note 29, at 32-35; P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1981); Dellapenna, *supra* note 4, at 395-400; Helmholz, *supra* note 21.

[40] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife and the Witch* 144-147 (1966). Wet-nurses were also seen as a major population control device, J. Guillemeau, *The Nursing of Children* preface (1612). *See also* J. Sharp, *The Midwives Book* 38 (1671).

hibiting infanticide, culminating in "An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James I, ch. 27, § 3 (1624), that conclusively presumed murder from concealment of the death of a child in order to conceal its birth.

Only the emergence of abortion as a real alternative to infanticide reduced the incidence of infanticide, making it a minor legal problem. This intimate relationship between abortion and infanticide was demonstrated by Lord Ellenborough's Act which in the next section after the first English statutory prohibition of abortion reduced the penalty for concealment from death to a term of imprisonment. 43 Geo. III ch. 58, §§ 2-4 (1803).[41]

D. These Laws Were Applied Rigorously in the American Colonies

The English colonists brought the common law here of abortion with them. Inadequately reported colonial court records support this view. In just one colony, no less than three prosecutions for criminal abortion arose before 1660: *Proprietary v. Lambrozo*, 53 Md. Archives 387-391 (1663); *Proprietary v. Brooks*, 10 Md. Archives 464-465, 486-488 (1656); *Proprietary v. Mitchell*, 10 Md. Archives 171-186 (1652) [see App. D, at 34a].[42] Defendants escaped conviction in two of the cases because, before trial, they married (and thereby disqualified) the principal witness against them. Mitchell was convicted of attempted murder, apparently because of a failure to prove the cause of death for the stillborn child.

Prosecutions for abortion arose in other colonies. A Rhode Island woman received 15 lashes for fornication

[41] For the legislative history, *see* Keown, *supra* note 2 at 12-21.

[42] *See also Proprietary v. Robins*, 41 Md. Archives 20 (1658), and *Robins v. Robins*, 41 Md. Archives 85 (1658).

and attempted abortion. *Colony v. Allen*, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.).[43] Indictments survive from *In re the Stillbirth of Agnita Hendricks' Bastard Child* (1679), Ct. Rec. of New Castle on Del. 1676-1681, at 274-275 (1904), and *Colony v. Powell* (Va. 1635), 7 Am. L. Rec. 43 (1954). A 1716 New York municipal ordinance forbade midwives to aid or counsel abortion. 3 Min. of the Common Council of N.Y. 122 [see App. D, at 37a].[44]

While abortion and infanticide were not common in colonial America,[45] more colonial legal activity, just as in England, was directed against infanticide than abortion.[46] Still, colonial jurist James Parker, in one of the few secondary sources on the common law as applied in a colony, correctly concluded that the common law of abortion was part of the law applied in New York. J. Parker, *Conductor Generalis: Or, the Office, Duty, and*

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[43] Noted in L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth-Century New England* 329, 336 n.132 (1980).

[44] M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* 174-175 (1949). For a similar ordinance in Virginia *see* S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (2d ed. 1942).

[45] J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 26, 65 (1988); Gordon, *supra* note 29, at 33, 49-51; C. Scholten, *Childbearing in American Society 1650-1850* 9 (1985).

[46] Hoffer & Hull, *supra* note 39, at 33-113. Concealment statutes were enacted in eight colonies or states before an abortion statute, beginning with Massachusetts in 1696, *Charters & Gen'l L. of the Colony & Prov. of Mass. Bay* 293 (Dane, Prescott, & Story eds. 1814). At least one woman was prosecuted for concealment before a colonial statute was adopted, 2 J. Winthrop, *History of New England 1630-1649* 317-318 (J. Hosmer ed. 1908). Even the Salem Witchcraft Trials have been linked to infanticide, Hoffer & Hull, *supra* at 55-56. The close empirical link of the concealment statutes and abortion was demonstrated by the 11 states that enacted a concealment statute contemporaneously with the state's first abortion statute and by the 20 states that codified the two statutes together. Dellapenna, *supra* note 4, at 399.

Authority of Justices of the Peace 216-17 (1764) [see App. D, at 38a].

E. When Abortion Became More Common than Infanticide with the Development of Technical Means with a Lessened Danger to the Mother's Life, English and American Law Came to Emphasize Abortion as the Primary Evil

Abortion statutes were enacted throughout the nation and the world in the nineteenth century.[47] *Roe's* majority viewed this, and the accompanying increase in prosecutions, as resulting from Victorian sexual attitudes, fears for maternal health, and concern for fetal life. 410 U.S. at 147-152. Means insisted that only fear for maternal health applied.[48] They never explained why these reasons became weighty only in the nineteenth century. Mohr and his associates, while recognizing a "moral prejudice" favoring the life of unborn children,[49] argued that the central reason for the statutes was to assure the dominance of the newly organized allopathic physicians over competitors, especially midwives, and to a lesser degree concern to reverse falling birthrates among the native-born middle classes and to assure paternal dominance in the household.[50] These reasons, they claimed,

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[47] *See generally* Dellapenna, *supra* note 4, 389-407; Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961); J. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

[48] Means I, *supra* note 3, at 511-15; Means II, *supra* note 3, at 382-92.

[49] Mohr, *supra* note 5, at 35-36, 87, 104, 110-11, 140, 143-44, 147-59, 164-70, 196-99, 207, 214, 216-17, 261-63; *Casey Brief*, *supra* note 5, at 11, 15, 26-28; *Webster* Brief, *supra* note 5, at 11, 16, 25-28.

[50] Mohr, *supra* note 5, at 32-37, 86-122, 128-31, 134-35, 147-82, 166-70, 187-90, 202, 204, 207-16, 226-29, 237-40, 256-60; *Casey Brief*, *supra* note 5, at 13-21; *Webster* Brief, *supra* note 5, at 13-21. Mohr discounted concern for maternal health because he believed that abortion was safe. Mohr, *supra*, at 25-40.

were sufficient, without concern over fetal life, to overcome strong public support—among men as well as women [51]—for the free availability of abortions.

The actual reasons are quite different. Until *Roe*, voluntary abortion, unlike voluntary surgery generally, was never treated as a private matter between a patient and her physician.[52] The different legislative response is rooted in technological change.

The first report of an intrusion technique in England was in a case in 1732: [53] A woman was sentenced to the pillory and to three years in prison for inserting an iron rod into a second woman's womb, inducing an abortion at less than 14 weeks of gestation (well before quickening).[54] *R. v. Beare*, 2 The Gentleman's Magazine 931 (Aug. 1732) [see App. C, at 27a]. Similar prosecutions arose in 1781 and 1803. *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816); *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806) [see App. C, at 31a].

Abortion remained highly dangerous; the inserted object served as a highway for ready infection, and often

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[51] *See, e.g.*, Mohr, *supra* note 5, at 108-10, 115-18; *Casey* Brief, *supra* note 5, at 22-23.

[52] Consider the decision of the New York legislature in 1828 to reject a ban on all surgery unless "necessary for the preservation of life," but to accept another part of the same proposal that declared abortion a crime [see App. D, at 39a].

[53] The earliest mention of an intrusion procedure anywhere was in a description in Diderot's *Encyclopedie* [at 452 (1766)] which described an evidently bizarre experiment in Nurnberg in 1714. Shorter, *supra* note 29, at 188-208, places the invention of effective intrusion techniques late in the 19th century.

[54] Another case, four centuries earlier, resulted in the imprisonment of three men for the abortion of an unborn child of one month's gestation. *R. v. Code* (Hampshire Eyre 1281), JUST 1/789, m.1 [see App. C, at 14a].

was sufficiently painful to induce life-threatening shock.[55] Death was not as certain, however, as with injury and ingestion techniques. Intrusion quickly became the technique of choice, setting the stage for the surgical and other intrusion techniques that account for most abortions performed today. Lord Ellenborough himself spoke to the resulting sudden upsurge in abortions in the preamble to his famous Act: It concerned "certain . . . heinous offenses . . . of late also frequently committed . . ." 43 Geo. III, ch. 58. The drafters of the first Pennsylvania abortion statute made a similar observation. *Pa. Daily Legis. Rec.* No. 19, at 151 (1860). The Maryland Court of Appeals made the point even more directly in *Worthington v. State*, 48 A. 355, 356-57 (Md. 1901):

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother, doubtless, more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere . . . .

With the introduction of intrusion techniques, fears for the health risks to mothers of abortion first appeared in the legal literature.[56]

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[55] Bates & Zawadski, *supra* note 28, at 85-87. Apparently abortions killed one-third of the women undergoing them early in the 19th century. Dellapenna, *supra* note 4, at 400, 412.

[56] *State v. Murphy*, 27 N.J.L. 112, 114-115 (1858); O.W. Bartley, *A Treatise on Forensic Medicine* 3, 5 (1815); T.R. Beck & J. Beck, *Elements of Medical Jurisprudence* 276-77 (1823); J. Burns, *The Anatomy of the Gravid Uterus* 57-58 (1799); 1 East, *supra*

That abortion statutes almost invariably were adopted in the general codification of common law crimes [57] itself suggests that the statutes were not thought to change the law. Moreover, all nineteenth-century surgery was dangerous for the same reasons as for intrusive abortions (infection and shock), yet only for abortion were social or other pressures likely to induce one to undergo the procedure without prior risk to life or limb. Abortion statutes responded to premature application of new medical technologies,[58] indicating that intrusive abortions were as criminal as injury or ingestion abortions and that abortions were criminal regardless of the stage of pregnancy. The statutes settled the somewhat uncertain law of abortion,[59] uncertainty that suggests that abortion had not

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note 24, at 230; G. Male, *An Epitome of Judicial or Forensic Medicine* 116-117 (1816); A. Taylor, *Manual of Medical Jurisprudence* 595 (1842). *See generally* Keown, *supra* note 2, at 35-38.

[57] Lord Ellenborough's Act, officially the "Offenses Against the Person Act," was the first comprehensive criminal statute in English law. 11 Holdsworth, *supra* note 16, at 537.

[58] *Worthington v. State*, 48 A. 355, 356-57 (Md. 1901); *Moore v. State*, 40 S.W. 287 (Tex. Crim. 1897). *See generally* Keown, *supra* note 2, at 12-48.

[59] Nineteenth-century cases split over whether pre-quickening abortion was a common-law crime. CRIME: *State v. Reed*, 45 Ark. 333 (1885); *Lamb v. State*, 10 A. 208 (Md. 1887); *State v. Slagle*, 83 N.C. 630 (1880); *Mills v. Commonwealth*, 13 Pa. 630, (1850). NO CRIME: *Mitchell v. Commonwealth*, 78 Ky. 204 (1879); *Smith v. State*, 33 Me. 48, 57 (1851); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845); *Commonwealth v. Bangs*, 9 Mass. 387 (1812); *State v. Cooper*, 22 N.J.L. 52 (1848). Dicta in other cases also split on the question. The nineteenth-century's two leading treatises on American criminal law both concluded that, notwithstanding the several cases recently decided to the contrary, pre-quickening abortion was a common-law crime. 1 J.P. Bishop, *Criminal Law* § 386 (2d ed. 1858); 1 F. Wharton, *The Criminal Law of the United States* §§ 1220-1230 (5th rev. ed. 1861) [see App. D, at 45a]. The "Historians' Briefs" simply assert, without any discussion of the evidence, that abortion was not a crime at common law. *Casey* Brief, *supra* note 5, at 5; *Webster* Brief, *supra* note 5, at 4.

been a common practice, solemnly reaffirming social policy in the face of changing social behavior.

F. The Shift of Emphasis from Infanticide to Abortion as the Social Evil Represented a Widely-Shared Consensus on the Value of Fetal Life, a Consensus that Included Nineteenth-Century Feminists and Thus Can Hardly Be Characterized as a Conspiracy by Male Physicians and Others to Suppress Women

The nineteenth-century saw a steady broadening of abortion statutes to reach all abortions regardless of technique or stage of pregnancy and to include (in a number of states) punishment for the mother.[60] This broadening suggests, as contemporary courts generally held, that protection of fetal life was the major purpose of the statutes. *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Lee*, 37 A. 75 (Conn. 1897); *State v. Moore*, 52 Iowa 128 (1868) [see App. D, at 48a]; *State v. Watson*, 1 P. 770 (Kan. 1883); *Smith v. State*, 33 Me. 48 (1851); *People v. Sessions*, 26 N.W. 291 (Mich. 1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 51 P. 1091 (Utah 1898); *State v. Howard*, 32 Vt. 380 (1859).[61] Many religious and social leaders also supported treating abortion as a crime.[62] Only by impugning the integrity

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[60] The broadening is illustrated by the New York abortion statutes [see App. D, at 39a.] In 1845, New York made it a misdemeanor for a woman to seek or procure an abortion, raising it to a felony in 1872. Both "Historians' Briefs" flatly assert that women were never subject to punishment for abortion. *Casey* Brief, *supra* note 5, at 1; *Webster* Brief, *supra* note 5, 1.

[61] The "Historians' Briefs" mentioned only one case, and that to the contrary. *Casey* Brief, *supra* note 5, at 27-28; *Webster* Brief, *supra* note 5, at 26. They omit even mention of a later case from the same court, *State v. Gedicke*, cited in the text.

[62] *See, e.g.*, The Resolution of the Medical Society of the State of New York, 1867 N.Y. Assembly J. 443-44 (Feb. 28, 1867) [see App. D, at 44a]. The *Roe* majority quoted other representative statements, 410 U.S. at 141-142. *See also* Mohr, *supra* note 9, at 35-36, 175-76, 182-196; M. Olasky, *The Press and Abortion, 1838-1988* 17-53 (1988).

of innumerable social and professional leaders can one argue that protection of unborn children from the rising numbers of abortions was not a significant concern.

Historians favoring abortion rights would have us believe that nineteenth-century abortion statutes were adopted in struggles between doctors and midwives for markets, or between husbands and wives for dominance in homes, or of men to use women to prevent "race suicide." [63] If so, why were nineteenth-century feminists, even the most militant, adamantly opposed the legality of abortion? [64] This attitude continued into the twentieth century, with Margaret Sanger advancing abhorrence of abortion as a major reason for founding Planned Parenthood Federation.[65]

The authors of the *Casey* Brief, see feminist opposition to abortion based on Victorian hostility to sexuality or to "male license." [66] The sharp contrast—even among

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[63] *See* the text *supra* at notes 47-51.

[64] D'Emilio & Freedman, *supra* note 45, at 150-67; Gordon, *supra* note 29, at 106-20, Mohr, *supra* note 5, at 109-14. *See, e.g.*, E. Duffy, *The Relations of the Sexes* 274-75 (1876); A. Stockham, *Tokology* 246-50 (1887); (Susan B.) Anthony, *Marriage and Maternity*, 4 The Revolution 4 (July 8, 1869); (Elizabeth Cady) Stanton, *Child Murder*, 1 The Revolution 146-47 (March 12, 1868). *See generally* D'Emilio & Freedman, *supra* at 64; Gordon, *supra* at 129; Mohr, *supra* at 113. Note also that the penalties for abortion were harsher than for contraception. Only professional abortionists defended the social propriety of the procedures. Mohr, *supra* at 62-65, 76-79; Olasky, *supra* note 62, at 3-17.

[65] M. Sanger, *Motherhood in Bondage* 394-96 (1928). Petchesky decried Sanger's stand on abortion as a sell-out to male doctors. Petchesky, *supra* note 29, at 89-95. D'Emilio & Freedman described the politics of Margaret Sanger's work for birth control without mentioning her opposition to abortion. D'Emilio & Freedman, *supra* note 45, at 243-46.

[66] *Casey* Brief, *supra* note 9, at 18-19. Note that they do not mention the virtually unanimous condemnation of abortion by nineteenth-century feminists, seeking to link support for contraception to support for abortion. Mohr, at least, admits the "anomaly." *Mohr, supra* note 9, at 110-14.

women who had had abortions—between the horror feminists expressed for abortion and their accepting attitude to contraception suggests that their attitude was focused on abortion rather than on sex or men.[67] The story of the early feminists suggests again that nineteenth-century legislatures responded to a widely shared consensus that abortion was the taking of human life and far different from contraception.

III. LEGISLATURES ARE THE PROPER FORA TO RESOLVE THE COMPETING CLAIMS OF MOTHERS AND THEIR OFFSPRING

The historical nature of the abortion problem as the intersection of policies protecting mothers and children with changing medical technology suggests that the balancing of the resulting claims is best left to legislative rather than judicial development.[68]

A. Changes in Medical Technology Are Central to Proper Resolution of the Controversies over Abortion

Evolving medical technologies for performing abortions and for recognizing and caring for unborn children have shaped the interests in the controversy over abortion. Until the twentieth century, both sets of interests converged to criminalize abortion. Now those interests have diverged, bringing controversy to an area where once all agreed that only evil could be found.

Technical progress continued. Pain-killing drugs (beginning with morphine in 1806), anesthesia (from the 1840's), antiseptics (after 1867), sulfa drugs and antibiotics (from the 1930's) dramatically reduced the risk of maternal death or injury. Many women thus came to see abortion's prohibition, rather than its possibility, as the threat to their well-being.

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[67] *See, e.g.*, D'Emilio & Freedman, *supra* note 51, at 50-63, 64-65.

[68] A. Bickel, *The Morality of Consent* 28 (1975). *See also Roe v. Wade*, 410 U.S. at 219-223 (Rehnquist & White, JJ., dissenting).

Simultaneously, the perceived interests of society in unborn children changed as new medical information and technologies emerged with a focus on human reproduction. Consider the demise of the ancient distinction of "quickening." Application of cell theory to embryology at the opening of the nineteenth century revolutionized our understanding human reproduction [69] and was promptly followed by abortion statutes removing distinctions based on quickening.[70] An English court promptly interpreted the earlier statutory term "quick with child" to mean conception, rather than the felt movement of the child within the womb, returning to the original understanding of that term. *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838).[71] The changes underlined that the statutes were crafted to protect human life.

Today, embryologists or fetologists can diagnose and treat an unborn child independently of the mother, including removing the child from its mother's womb for surgery and then returning it to the womb to complete gestation. Facing such developments, one can hardly consider the child a mere extension of its mother.[72] For

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[69] 3 *A History of Science* 456-483 (R. Taton ed. 1965); A. Meyer, *The Rise of Embryology* 28-120, 138-147, 170-194, 302-341 (1939); J. Needham, *A History of Embryology* 115-229 (1959).

[70] Illinois had already removed the quickening distinction, but only for abortions by a "noxious substance.' Ill. Rev. Code § 46 (1827). Maine adopted the first American statute removing all distinctions based on quickening. Me. Rev. Stat., ch. 160, §§ 13, 14 (1840). *See also* The offenses against the Persons Act, 7 Will. IV & 1 Vict., ch. 85 (1837).

[71] Philip Rafferty's research has persuaded the Oxford English Dictionary to change its definition of "quick with child" to conform to the *Wycherley* definition, according to a letter, date 23 Nov. 1990, from J.A. Simpson, co-editor of the Dictionary, to Mr. Rafferty (copy in my possession). The phrase apparently became confused with the phrase "with quick child." *But see State v. Cooper*, 22 N.J.L. 53, 57 (1849).

[72] Consider the odyssey of Dr. Bernard Nathanson from "Abortion King" of New York to anti-abortion activist through his experiences as a fetologist. B. Nathanson, *Aborting America* (1979); B. Nathanson, *The Abortion Papers* (1983).

one who does not accept fetal personhood, the continuing prohibition of abortions that are increasingly safe for mothers can only seem a serious intrusion into the liberty of women because of a "moral prejudice". This view ignores the unbroken common law tradition of protecting unwanted children as far as possible from aggression by their parents.

Reproductive technology remains one of the most rapidly advancing areas of medical research; hoping not to impede this progress, this Court has sought to preserve physicians' autonomy.[73] While professional autonomy promotes continuing medical advances, law cannot be fashioned solely to protect the autonomy of the technicians: Issues relating to abortion transcend mere technical competence. In balancing the interests and values created or reinforced by changing medical technologies, states need the same broad authority to regulate the conduct of physicians performing abortions as for other medical procedures.

B. Legislatures Are Best Placed to Explore Appropriate Regulatory Responses to Changing Reproductive Technologies

To resolve this controversy, we must escape the language of rights and the atomistic vision of society it entails: [74] we must balance concern for the dignity of women and the needs of poor and working mothers with

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[73] In *Doe v. Bolton*, the majority accorded doctors standing as a class, 410 U.S. at 188-189, and repeatedly adverted to the doctors' privacy interest, *id.* at 192-193, 196-201. Although the majority denied standing to a specific doctor in *Roe v. Wade*, 410 U.S. at 125-127, they repeatedly referred to medical opinions, *id.* at 130-132, 141-146, 149-150, 159, 163, and they finally gave the physician decision-making power equal to the mother, *id.* at 153, 162-166. *See also Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-765 (1986).

[74] M. Glendon, *Abortion and Divorce in Western Law* 131 (1987); Veltri, *Book Rev.*, 18 Oh. N.U.L. Rev. 257, 272 (1991).

the welfare of unborn children, all in a context continually reshaped by changing medical technologies.[75] To address these concerns adequately, the abortion question must be returned to the political processes, primarily in the states.

Legislatures are better at establishing policies for the future, leaving courts to fashion remedies for past wrongs.[76] A legislature can fund programs to reduce the need for abortion and can accurately reflect the prevailing sentiments of the community on this divisive issue. Courts can only issue injunctions; they are simply not suited to serve as a board of review for issues of medical technology, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-459 (1983) (O'Connor, J., dissenting), as the court in *Roe* recognized when it was unable to decide when an individual human life (a "person") begins, 410 U.S. at 160. Yet such decisions of life and death are simply too important to be left to the technicians, especially when the technicians have an economic stake in deciding against life. Finally, as Justice Brandeis argued in his dissent to *New State Ice Co. v. Liebman*, 285 U.S. 262, 309-311 (1932), for such morally and socially unsettled problems, the states should serve as laboratories for social experiment. *See also Addington v. Texas*, 441 U.S. 418, 431 (1979).

CONCLUSION

Roe v. Wade should be overruled. Failing that, the application of *Roe v. Wade* should be reconsidered and the Pennsylvania statutes should be upheld as consistent with the values and policies expressed in that decision.

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[75] Note the factual changes between the trial and its review by this Court in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79, 95-99 (White, J., disenting, with Burger, C.J., & Rehnquist, J.), 101-102 (Stevens, J., concurring) (1976). *See generally* Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 Am. J.L. & Med. 69 (1988).

[76] *City of Richmond v. J.A. Croson Co.*, 469 U.S. 469, 513-14 (1989) (Stevens, J., concurring).

Respectfully submitted,

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April 6, 1992

APPENDICES

APPENDIX A

THE INTEREST OF THE *AMICUS CURIAE*

This brief is filed under Supreme Court Rule 36, with the consent of the parties, on behalf of the American Academy of Medical Ethics as *amicus curiae* in support of Respondents, Cross-Petitioners. The Academy is an educational and lobbying organization with approximately 20,000 physician members. The Academy was incorporated in 1986 to respond to the challenges to established medical ethics emerging in recent decades. The Academy is co-publisher of the journal *Issues in Law and Medicine* and sponsors national meetings as fora for dialogue on medical and ethical questions. The Academy follows the Hippocratic Oath in opposing abortion except to save the life of the mother. The Academy sees an unborn child as a patient deserving the protection and the full advocacy of an attending physician. The Academy has consistently asked the Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973), or to reconsider its application in light of current medical technology and societal interests.

APPENDIX B [1]

WHAT REALLY HAPPENED IN *REX v. de BOURTON?*

(a.k.a. the Twinslayer's Case)

1327-1328

The Uncorrected, Incomplete Year Book Report of *Rex v. de Bourton*, Y.B. Mich. 1 Edw. 3 f. 23 pl. 18 (1327)[2]

A writ issued to the sheriff of Gloucester to apprehend one D. who, according to the testimony of Sir. G. Scrop, is supposed to have beaten a woman in an advanced state of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop, and D. came, and pled Not guilty, and for the reason that the Justices were unwilling to adjudge this thing as felony, the accused was released to mainpernors, and then the argument was adjourned since die. Thus the writ issued, as before stated, and Sir G. Scrop rehearsed the entire case, and how he [D.] came and pled.

Herle: to the sheriff: Produce the body, etc. And the sheriff returned the writ to the bailiff of the franchise

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[1] The appendix was adapted from the unpublished research of Mr. Philip Rafferty of the Los Angeles Bar. The translations are by Dr. J.H. Baker of Cambridge University. Dr. Baker's text, *An Introduction to English Legal History* (3d ed. 1990), is a leading text for the study of the topic. All translations are Dr. Baker's. The footnotes are mine.

[2] This is the form of the case as known to the later common law commentators such as Staunford, Coke, Hale, Blackstone, and Hawkins, as well as how it is known to all modern commentators. *See, e.g.*, Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 337 (1971).

of such place, who said, that the same fellow was taken by the mayor of Bristol, but of the cause of this arrest we are wholly ignorant.

Corrected, Incomplete Year Book Report of *Rex v. de Bourton*[3]

A writ issued to the sheriff of Gloucestershire to take one D., who, by the testimony of Sir Geoffrey Scrop, is supposed to have beaten a woman great with two children, so that immediately afterwards one of the children died, and she was delivered of the other, which was baptised by the name of Joan, but died two days later from the injury which the child had; and the indictment was returned before Sir Geoffrey Scrop; and D. came and pleaded Not guilty; and because the justices were not minded to treat[4] this thing as a felony, the indictee was released on mainprise [bail] and then this matter remained with a day set, and so the writ was issued as above, and it said that *by testimony of* Sir Geoffrey Scrop *etc., and* recited the whole of the case [as above], and how he came and pleaded etc., [and that the sheriff should have caused his body to come etc.][5] And the sheriff returned the writ to the bailiffs of the franchise of such and such a place, who said that the person in ques-

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[3] Dr. Baker uncovered this text by examining the four original manuscripts of the Year Book Report: Lincoln's MS. Hale 72 at fo. 86v; Lincoln's Inn MS. Hale 116 at fo. 3; Lincoln's Inn MS. Hale 137(2) at fo. 11; Bodleian Library Oxford MS. Bodl. 363 at fo. 9v. The four agree with each other and differ from the printed version—some two centuries later than the manuscripts. Matters wholly omitted in the printed text are italicized. Dr. Baker's letter describing his search is on file with Mr. Rafferty.

[4] *d'agarder* ("to award") in all MSS.; *adjudge* only in the printed version.

[5] The passage is garbled in the printed version, coming after the reference to C.J. Herle, who was Chief Justice of Common Pleas and not of the King's Bench. The case was being heard before the King's Bench.

tion had been taken by the mayor of Bristol, but they were wholly unaware of the reason for the taking etc. *Therefore, a writ issued to the major of Bristol to cause the body to come, together with the cause etc.*

The Original Court Records in *Rex v. de Bourton*, K.B. 27/270, Rex m.9 (Mich. term 1327)

Gloucestershire. The lord king has sent his writ to the sheriff of Gloucestershire in these words: Edward by grace of God kind of England, lord of Ireland and duke of Acquitaine, to the sheriff of Gloucestershire, greeting! Because we have learned by the certificate of our beloved and faithful Geoffrey le Scrop, our chief justice, that Richard de Bourton has been indicted for that he entered the house of William Carles, tailor, at Bristol, and assaulted Alice, wife of the same William, being there greatly pregnant with two children,[6] and with his hands beat and ill treated her, and violently knocked her to the ground, and with his feet so trampled upon the ground [*sic*] that he feloniously killed one of the aforesaid children in the belly of the same Alice its mother, and broke the head and arm of the other of the same children so that it was forthwith born and baptised by the name of Joan, and immediately after receiving her baptism died from the injury[7] aforesaid; and that the foregoing matters still remain undetermined before ourself; and that this Richard had a day before us at a certain day now past for hearing the jury of the country on which, for good and ill, he put himself concerning the felony aforesaid, by mainprise of John le Taverner of Bristol and others named in the said certificate, who mainprised to have him before us at the said term; and on behalf of the selfsame Richard we are given to understand that by reason of the foregoing he has been taken, since that mainprise, and detained in our prison of Bristol, on ac-

[6] *grossam doubus pueris pregnantem*

[7] *de malo*

count of which he could not come before us on the aforesaid day to stand to right upon the foregoing according to the law and custom of our realm: We, willing what is just to be done upon the foregoing, command you (as we commanded before) that if the same Richard is detained in the aforesaid prison by reason of the foregoing and not otherwise, and if he finds you sufficient mainpernors who mainprise him before us in a fortnight from Michaelmas day wheresoever we should then be in England, to do and receive what our court should decide in the foregoing, then cause the selfsame Richard to be meanwhile delivered from prison by the mainprise aforesaid. And have you there the names of those mainpernors, and this writ. And if the same Richard is indicted for any other felonies or tresspasses in your county, then without delay send us distinctly and openly under your seal the tenor of the aforesaid indictment at the aforesaid day, that we may do further therein what by the law and custom aforesaid should be done, or else signify unto us the reason why you will not or cannot carry out our command heretofore directed unto you. Witness my self at Northallerton, the 14th day of July in the first year of our reign [1327].

By virtue of which writ, the sheriff (namely, Thomas de Rodbergh) returns that he command Everarrd Fraunceys and Robert Grene, bailiffs of the liberty of the vill of Bristol, who answered him that Richard de Bourten, lately indicted for the death of Joan, daughter of William Carles, tailor, at Bristol, as is contained in the writ, has not been taken by them the said bailiffs nor is for that reason detained in prison, but that he has been taken and detained by Roger Rurtels the mayor of the aforesaid vill for certain reasons which are unknown to them the said bailiffs etc.

And, after inspection of the aforesaid writ and return etc., the mayor and bailiffs of the vill of Bristol are commanded that if the same Richard finds sufficient mainpernors to be before the king in a fortnight from St.

Hilary wheresoever etc. to hear the aforesaid jury and to do further and receive what the king's court should decide for him, then they should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the above-mentioned mainprise. And if he is indicted for any other felonies or trespasses before them in the vill aforesaid, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid upon the incumbent peril, so that the lord king further etc. what is to be done etc.

At which day the mayor and bailiffs of the vill of Bristol return that the aforesaid Richard de Bourton did not find sufficient mainpernors for being before the lord king at this day, namely in the quindene of St. Hilary etc., and to do and receive what is commanded in the writ, as a result of which they did nothing further in executing the writ etc. And because the same mayor and bailiffs have not returned here before the king the names of themselves according to the form of the statute etc., and also have not answered etc. for what reason the aforesaid Richard de Bourton has been taken, as in the lord king's writ directed them therein was commanded, nor whether or not the aforesaid Richard is indicted for any other felonies or trespasses before them in the vill aforesaid, the same mayor and bailiffs (namely, John le Romeseie, mayor, and Hugh de Langebrigge and Stephan Lespcier, bailiffs etc.) are in mercy. And they are assessed by the justices at 40s. And the sheriff is commanded that he should not omit by reason of the liberty of the aforesaid vill to enter the same etc., and if the same Richard should find him sufficient mainpernors to mainprise to have him before the king in a fortnight from Easter day wheresoever etc. to hear the jury aforesaid etc. and further to do etc., then he should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by mainprise aforesaid etc. The sheriff is also commanded that he should not omit on account of the

liberty to cause the aforesaid mayor and bailiffs to come before the king at the said term to answer the king for the return etc. Also the mayor and bailiffs are commanded that if the aforesaid Richard is indicted for any felonies and trespasses before them in the aforesaid vill, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid etc. so that further etc.

Original Court Records of Further Proceedings in *Rex v. de Bourton*, K.B. 27/242, Rex m.9 (Easter term 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition etc. whether Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he has been indicted (as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king caused to come before him), is put in respite until the octaves of St. John the Baptist wheresoever etc., for want of jurors, because none [came] etc. Therefore, let the sheriff have the bodies of all jurors before the king at the said term, etc. And let the aforesaid Richard meanwhile be released by the mainprise which heretofore found, from day to day until etc. And the sheriff is commanded that except for them etc. he should put in as many and such etc. and have them before the king at the said term etc.

Original Court Records Concluding Procedings in *R. v. de Bourton*, K.B. 27/273, Rex m.12d (Octave of St. John, 2 Edw. III, 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition of whether or not Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he is indicted—as appears to

the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king has cause to come before [himself] etc.—is put in respite until one month from Michaelmas day, wheresoever etc., for want of jurors, because none [came] etc. Therefore let the sheriff have the bodies of all the jurors before the king at the said date etc. And let the aforesaid Richard meanwhile be released by the mainprise which he previously found, from day to day etc. Afterwards, the same term, the aforesaid Richard came and proffered a charter of the present lord king for pardon of the aforesaid felony, which is enrolled in Hilary term in the first year of the reign of our present king. Therefore he [is to go] thereof *sine die* etc.

Dr. Baker's Comments on the Problem of Deciding the True Course of Events in *Rex v. de Bourton* in two letters sent to Mr. Rafferty in 1985

From the letter of Nov. 6, 1985:

"Richard de Bourton was indicted before the coroners of Bristol (1) for feloniously killing a child which died in the womb, (2) for causing the death of the other (Christened Joan). We do not . . . have the indictment, though as summarized [in the year book report] . . . it does seem that the words of the felony applied to both children. In the later entries, the offense is described only as the killing of Joan, but that may have been clerical shorthand.

"The indictment was removed into the King's Bench some time in the reign of Edward II. The indictment files do not survive. I discovered that the King's Bench held two gaol deliveries in Gloucestershire in the 1320's, but the indictment is not recorded there (K.B. 27/247, Rex m.1d; K.B. 27/255, Rex m.24).

"Bourton pleaded not guilty, and was released on mainprise to appear at some time before Michelmas term

1327, but before his appearance he was arrested by the mayor and bailiffs of Bristol for some undisclosed cause. . . . [That] the judges were not minded to treat it as a felony . . . seems to me . . . not a final determination of that question—indeed the record says that the issue of felony was still pending in 1328—but related only the bail application."

From the letter of Dec. 12, 1985:

"As I now see the case, the record shows that Bourton was indicted for feloniously killing a child which died in the womb of the mother and another (Joan) which died after birth and baptism; that he pleaded not guilty, but was never tried; and that in Trinity term 1328 he was discharged on the strength of a pardon granted a year earlier. There is therefore nothing of record to show whether the court considered the facts alleged to amount to a felony or not, except insofar as the case was continued through several terms on the basis that it *was* a felony. (It could be, however, that only the killing of Joan was so regarded.) It is therefore the yearbook report that remains crucial, and this appears to say (in the middle) that Bourton was granted bail because the judges were not minded to treat it as a felony. The status and meaning of this pronouncement still seem[s] to me less than clear. For one thing, it seems contrary to the record, which shows that the case was continued on the basis that a jury had been summoned to try whether Bourton was guilty of feloniously killing (what we should call manslaughter). That issue arose from Bourton's plea of not guilty, which the court had recorded. [T]here is therefore no question of the indictment having been quashed on the ground that it did not disclose a felony. Secondly, although it is probable that bail was not thought to be grantable for murder in medieval times (Y.B. 25 Edw. III, fo. 85; Coke, *Treatise on Bail & Mainprise;* Staunford P.C. 72a), it seems to have been allowable for

felony.[3] It could hardly be argued that the release of Bourton on bail shows that if the facts were true he would not have been guilty of felony, because that again would be contrary to the record. I therefore do not really understand the year book in this respect, and suspect it may be a defective report.

"A pardon does not necessarily imply a legal doubt, at this date. Pardons were sometimes granted for favour. This case does look unusual however, because it appears from the patent roll (*Calendar Patent Rolls 1327-1330*, p. 113: Pat. 1 Edw. III, pt. 2, m.17) that Bourton was included in the general pardon of 29 May 1327 but with the special proviso that, unlike the other persons pardoned with him, he was to be excused from serving against the Scots. (The others were apparently ordinary felons conscripted into the army.)

"The pardon is not to be found in the roll for Hil. 1 Edw. III, which is defective."

Mr. Rafferty's comments on *Rex v. de Bourton* in an unpublished manuscript made available to me in 1989 and 1991

"[A] person, who would continue to maintain that *Bourton's case* stands for the proposition that the fetal victims described in the *Bourton* indictment are not potential victims of common law criminal homicide, must implicitly adopt each of the following three premises: 1) the three foregoing *Bourton* 'felonly' plea roll entries represent defective entries. 2) The *Bourton* justices did not understand then existing English laws and customs on bail in felony cases. 3) The *Bourton* justices did not then understand the then existing common law on criminal homicide. . . . What is more, such a person would

[3] The Statute of Westminster I (3 Edw. I, c. 15, 1275) provides that one indicted for homicide is not mainpernable or replevisable except when he is indicted on "light suspicion". Although Dr. Baker does not advert to "light suspicion", this might explain the apparent confusion in the Year Book reports of the case.

also have to 'invent' a 14th century common law legal procedure through which a defendant at a 'post-arraignment,' pretrial hearing could bring a facial challenge to a felony indictment. This is so, because so far as is known, no such procedural tool existed at the 14th century common law. It simply cannot be overlooked that Bourton did not demur to the felony indictment. He pled not guilty to it."

APPENDIX C[1]

OTHER REPRESENTATIVE ENGLISH LEGAL MATERIALS RELATING TO ABORTION

Agnes's Appeal

1200, 1 Selden Soc'y 39 (no. 82, 1887)

Lincolnshire. Agnes, the daughter of Saxi, appeals John of Paris that whereas she was in labor, he came to her house and dragged her out by the feet and struck her with a certain pole in such a way that she lost her child. And the citizens of Lincoln came and showed a charter of the lord king which witnesses that they should not be impleaded outside the walls of Lincoln (except for their moneyers and officials), and that they ought not to make battle concerning any appeal but to deraign themselves[2] according to the liberties and laws of the city of London;[3] and they prayed this liberty. A day is given to them before the lord king wheresoever he should then be in England on the morrow of St. Edmund to hear their judgment.[4]

Amice's Appeal

JUST 1/274, m.14d (1247)

Amice, who was the wife of Ralph Gundwine, appeals Adam Warner, William Warner and Henry Warner that

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[1] For the cases before 1600, I have used original translations by Dr. J.H. Baker (*see* Appendix B n.1) in order to achieve a consistent usage and reliable English texts. Dr. Baker provided his translations to Philip Rafferty of Los Angeles. I have preserved original spellings and grammer in the sources originally in English. All footnotes are mine.

[2] *I.e.*, to vindicate themselves or to prove their innocence.

[3] *I.e.*, trial by wager or law—through oath-helpers.

[4] The outcome has not been found.

they came to the house of her the said Amice and broke her house, and took her the said Amice and beat her severely so that, by reason of that beating, she the said Amice lost her child which was in her belly. And that they did this to her wickedly and feloniously against the peace etc., she offers etc.

And the aforesaid Adam and others come and deny the [breach of the peace], the beating, and the whole etc. and put themselves upon a jury of the township. And they offer the lord king 50 pounds for having the jury therein, by pledge of [12 names].

And the jurors say upon their oath that in truth the aforesaid Adam and others beat the aforesaid Amice; but they say that she immediately went off, and walked about hither and thither, and afterwards when eight days had elapsed she aborted a certain child having the form of a male five inches long; but they believe that this was rather due to the labor and foolish behavior[5] of the selfsame Amice than to the aforesaid beating.

Juliana's Appeal

1256?, Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healy ed. 1897)

John de Rechich beat one Juliana, daughter of Maynard, so that he killed her boy in her womb, and fled. Therefore let him be exacted and outlawed. He was received at Stoke Curcy. Therefore [that township] is in mercy.[6] The jurors concealed that matter; therefore they are in mercy. He had no chattels.

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[5] *stultum gestum*

[6] *I.e.*, to be amerced: to pay a fine in lieu of more serious punishment.

Rex v. Code

Eyre of Hampshire, 1281, JUST 1/789, m.1 [7]

. . . Alice, the wife of Adam Prest, coming from the city of Winchester out of the vill of Upham, met *Walter* Code, Richard the Potter, and Stephen his brother, and Herbert the Carpenter, who knocked her over and *beat* her and would have lain with her by force, so that by the violence which they committed against her she gave birth to a certain abortive *child* as if [8] of the age of one month. William de Stratton, the coroner, did not *come*; therefore to judgment of him. Afterwards the aforesaid Walter and the others come and deny the death, the felony, and all . . . *and thereof* they put themselves upon the country. And twelve jurors say upon their oath that the aforesaid Walter, Richard, and Stephen with force knocked over and beat the aforesaid Alice, as a result of which she gave birth to a certain abortive child of such an age that it was unknown whether it was male or female; which child was eight inches long. And they say that the aforesaid Herbert is not guilty thereof. Therefore *let him be* quit thereof. And the aforesaid Walter, Richard, and Stephen are committed to prison.

Rex v. Mercer

Eyre of Oxford, 1285, JUST 1/710, m.45

Emma, the wife of Reynold the Mercer, and Alice, the daughter of Thomas of Northleigh, being pregnant, were fighting together in the field of Northleigh in such a way that the aforesaid Emma struck with a certain stone on the side, by which blow the same Alice on the second day following gave birth to a certain living male child having

[7] The manuscript is badly worn; the italicized words have been suplied by inferences from the parts of the manuscript which survive.

[8] *quasi*

on its head a wound from the blow of the same stone; which child died immediately after it was baptized. And the jurors say upon their oath that the aforesaid Alice gave birth one month before the time of birth,[9] and that the child died from the aforesaid blow, in respect of which they suspect her of wrong. Therefore, let her be outlawed and waived.

Rex v. Haule

Eyre of London, 1321, JUST 1/547A, m.20d

In the twelfth year of the aforesaid reign of King Edward, John of Gisors being coroner, Stephen of Cornhill and Robert de Rokesle then being sheriffs, a certain Maud de Haule [10] and Agnes the Convert [11] were fighting together in this ward, and a certain Joan of Hallynghurst came along and separated them from each other, by reason of which the aforesaid Maud threw the aforesaid Joan out of the house where she dwelt and she fell on the step of a solar of the same house so that on the fourth day following she gave birth to a certain child of the female sex ten weeks before the due time,[12] which the same child died immediately after birth. And the aforesaid Maud was taken immediately after the deed and led to Newgate prison in the time of the aforesaid sheriffs. Therefore [let them answer for what happened].[13] And Robert Gobba, John Braaz, and Richard atte Vyngne, three neighbors, did not come; but they are not suspected of wrong. The aforesaid Robert was attached by Walter le Ken; therefore [he is] in mercy. The other mainpernor has died. The aforesaid John was attached by Hugh Trigge and John de Haleford; therefore [they are] in mercy. The aforesaid Richard was attached by John

[9] *tempus pariendi*

[10] The name could also be read as "Hanle".

[11] *Agnes le Converse*

[12] *per decem septimasna ante tempus pariendi*

[13] Translation uncertain.

Bardewyne and John le Kent; therefore [they are] in mercy. Afterwards William le Leyre and Henry atte More, tenants of part of the lands which were held of the aforesaid sheriffs, come and fully admit that the aforesaid Maud de Haule was in the aforesaid prison in the time of the aforesaid sheriffs, and they say that the aforesaid Maud was hanged before Hamon Hauteyn and his fellows, justices assigned to deliver the gaol aforesaid etc. And that appears from the rolls of the same Hamon etc. She had no chattels etc.

Rex v. Anonymous (a.k.a. the Abortionist's Case)

K.B., 1348, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268, pl. 263 (1st ed. 1516)[14]

One was indicted for that he killed a child in its mother's belly, and the opinion [was] that he shall not be arraigned on this since no name of baptism was in the indictment, and also it is hard to know whether he killed it or not etc.

Selected Readings on the Law of Murder [15]

Excerpts from John Baldwin's Reading, Grays Inn, c. 1455/60

[Statute of Marlborough, c.25] Before the making of this statute, the word *murdrum* implied felony, namely man-slaying, which was so henious that the penalty was death, in whatever manner the slaying was done. Thus, even if the intention of the person who killed the man was not to slay him, but it was by misfortune, nevertheless it would have been adjudged murder, which was a felony for which he would have been put to death . . . because

[14] Dr. Boaker, in a letter to Philip Rafferty (Dec. 12, 1985), indicated that the case does not appear in the various Year Books for 1348, and cannot be traced back before Statham's *Abridgment* (c. 1490, f. 58, pl. 91), which is reproduced in Fitzherbert's *Abridgement*.

[15] Unpublished; found and translated from Law French by J.H. Baker.

it tended to the improverishment of the realm. Now, however, by this statute it is laid down that it shall not be deemed murder where it may be adjudged to be by misfortune . . . There may be murder and yet no felony—as where a piece of timber falls on a man, or a horse kills a man—but the cause of his death shall be forfeited to the king as deodand. . . . There may be murder even where a man does not lay his hands upon or strike anyone, and it is felony: for instance, if a man poisons another, or makes a trap whereby the other dies. And it is a good indictment to say "that he feloniously slew" even though he did not lay his hands [on the deceased] . . . It is a good indictment before the coroner, if the person killed is unknown, to say "that he slew (or feloniously murdered) someone unknown"; that is adjudged. Also "feloniously slew a certain unbaptised person"; for that he shall be put to death. It is otherwise if a man strikes a pregnant woman, and she is delivered of one who is dead; there is not felony, because it cannot be known whether it was by the striking or some other cause, because it was not that time in being, and therefore it cannot be tried.

Excerpts from Thomas Pygot's Reading, Grays Inn, 1510

[Statute of Marlborough, c.25.] . . . There is a distinction between murder and manslaughter; for murder is where a man kills another upon malice aforethought (as, by lying in wait for him), and manslaughter is where people who are not friends meet suddenly, or a sudden dispute arises between friends, and one kills the other: that is manslaughter. But for either of them [the offender] shall die. Therefore it is now to be seen for what murder and manslaughter a man shall die, at common law and at the present day. The statute says, "where it is *solely* by misfortune", and therefore if murder is mixed with malice or negligence he shall die. . . . [If] a physician or surgeon gives contrary medicine, so that the sick person dies, it is felony, just as if it had

been poison. (But this must be understood where it is done *animo felonico*; otherwise not. So the circumstances in which he is killed by negligence may be enquired into.) . . . Killing an enemy alien who does not have a safe-conduct shall not be felony. . . . Also I may be indicted for killing someone unknown, because he might have been disfigured by me or have come from a distant region. . . .

Rex v. Lichefeld

K.B. 27/974, Rex. m.4 (1505)

Nottinghamshire. Heretofore, namely on the vigil of the Epiphany of [our] Lord in the nineteenth year of the reign of the present lord king [Jan. 5, 1504], at Basford in the aforesaid county, before Richard Parker one of the said lord king's coroners in the aforesaid county upon the view of the body of Jane Wynspere of Basford aforesaid, it was presented by the oath of twelve jurors that the said Jane Wynspere of Basford in the county of Nottingham, single woman, being pregnant,[16] on the twelfth day of December in the year above mentioned [1503] at Basford aforesaid, being inspired by the devil drank various bad [17] and [pure] [18] potions in order to kill and destroy the child in her body,[19] and took them into her body, as result of which the said Jane then and there died, and thus the same Jane in manner and form aforesaid feloniously and as a *felo de se* slew and poisoned herself and the child in her body; and that Thomas Lichefeld of Basford in the county aforesaid, cleric, knowing that the said Jane had committed said

[16] *puerpera*: perhaps "in labor".

[17] *corupta*

[18] *immaculata*, which Dr. Baker suggests here should be translated as "polluted" although it means the opposite; perhaps, the *in-* refers here refers to putting something in the potion rather than to negative *-maculata*.

[19] *infantem in corpore suo*

felony in form aforesaid, then and there feloniously harbored *the* said Jane . . . .

On the Thursday after the quindent of Hilary [Jan. 30, 1505], Lichefeld comes in custody and demurs to the indictment on the ground that the principal is dead and that he cannot answer without her. The court adjudges that he is discharged *sine die*.[20]

Rex v. Wodlake

Indictment, K.B. 9/513/m.23 (1530)

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the county of Middlesex, net-maker, on the twentieth day of May in the seventh year of the reign of Henry VIII [1525], with force and arms (namely knives etc.) at the aforesaid parish of St. Clement, assaulted Katherine Alaund, then a girl of fourteen years of age, and then and there violently and against her will feloniously raped her and carnally knew her, against the peace of the lord king etc.

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the count of Middlesex, net-maker, on the tenth day of November in the eighteenth year of the reign of King Henry VIII [1526], by the instigation of the devil, knowing that a certain Katherine Alaund was pregnant with a child,[21] with dissembling words gave the same Katherine to drink a certain drink in order to destroy the child then being in the said Katherine's body,[22] and desired and caused her the said Katherine to drink the selfsame drink, by reason of which drink the same Katherine was afterwards delivered of that child dead: so that the same William

[20] Note that the lack of the allegation "*contra pacem*" in the indictment would also have been sufficient grounds for a demurer.

[21] *cum puero esse pregnatum* [*sic*]

[22] *dictum puerum in corpors dicte Katerine existentum*

Wodlake feloniously killed and murdered the child with the drink in manner and form aforesaid, against the peace of the lord king etc.

The Endorsement of the Indictments after Mandamus for Removal to the King's Bench, K.B. 9/513/m.23d (1530)

TRUE BILL taken at St. John's Street in the county of Middlesex before Sir John More, knight, Robert Wroth, Robert Cheseman, John Brown, Richard Hawkes, and John Palmer, keepers of the peace of the lord king and the same king's justices assigned to hear and determine various felonies, tresspasses, and misdeeds in the county of Middlesex, on the Thursday next after the feast of the Conception of the Blessed Virgin Mary in the twenty-first year of the reign of King Henry VIII [Dec. 9, 1529], by the oath etc. of . . . jurors [23] delivered before the lord king on the Saturday next after the quindene of St. John this same term [July 9, 1530], by the hand of the aforesaid John More, one of the aforesaid justices, in order to be determined.

[Sewn to the bill, in the King's Bench file, is a writ dated April 29, 1530, ordering the justices of the peace for Middlesex to send all indictments concerning William Wodlake for appearance "before the king", i.e., before the King's Bench. The writ, tested by Chief Justice Fitz-James, is endorsed by Sir John More that all indictments concerning Wodlake have been sent according to the tenor of the writ.]

In the Controllment Roll of the Clerk of the Court, K.B. 29/162/m.11d (1531)

Middlesex. William Wodlake (dead) of the parish of St. Clement Danes in the county aforesame, net-maker, is to be taken [and brought here] in the octave of Michaelmas [to answer] for various felonies, murders, and misdemeanors of which he is indicted . . . . Afterwards, in

[23] Refers to the grand jury.

Hilary term 22 Henry VIII [1531] he is to be taken [and brought here] in the quindene of Easter: at which day he is dead. Therefore let the process against him here totally cease.

Cockaine v. Witnam

Hil., 19 Eliz. 1 (1577) Action for Slander

Version 1: Brit. Lib., Ms. Landsdowne 1067, fo. 97

"The Lady Cockeyn [*sic*] offered A.B. her maid a drink in order to murder her child, because her butler had gotten it." And although this was not murder, for the infant was *en ventre sa mere*, the action nevertheless lay.

Version 2: Cro. Eliz. 49, pl.4 (1586)

Action for words. At the Nisi Prius the defendant pleaded *concord pius le darraine* continuance, judgment *si al enquest*, etc. And by all the justices it was no plea, but he ought to conclude, judgment *si actio*, etc., and so in all pleas pleaded since the last continuance.

Then it was moved, if judgment shall be given upon this, or a new Nisi Prius be granted; and upon good advice judgment was given for the plaintiff, for it was a confession of the matter in issue.

The words were "My Lady Cockaine did offer two shillings to a woman with child, to get her a drink to kill her child, because it was gotten by J.S., Sir Thomas Cockaine's butler." And it was moved the action did not lie for these words; but it was adjudged for the plaintiff, for by them the lady's credit is impaired; and, if true, there was cause to bind her to good behaviour, although it was not said she did give money, or any hurt was done, but that she offered etc. This case was adjudged Hill. 19 Eliz. Intratur, Mich. 17 & 17 Eliz. Rot. 183. *Ex relatione* Chamberlaine. *Vide* 4 Co. 16.b.

Version 3: Harv. L.S. Lib. Ms. 1180(1), fo. 387

For this he vouched a case in Michaelmas 17 & 18 Eliz., roll 483, between Sir John Cockin [*sic*] and his wife and one Wyman [*sic*], because Wyman spoke these words, "My Lady Cockin did offer one Bash 10 pounds to get her a drink to destroy the child she went withall, because Mr. Cockin's butler had begotten it"; and it was ruled that an action lay, and yet he did not say that a drink was got, but only an offer to get . . . .

Regina v. Turnour

Assize 35/23/29 (Essex 1581)[24]

Essex: The jurors for [our] lady the queen present that Jane Turnour of Stisted in the aforesaid county, spinster, being a common witch and enchantress, not having God before her eyes, but being seduced by the instigation of the devil, on the eight day of January in the twenty-second year of the reign of the Lady Elizabeth [1580], Queen of England, France and Ireland, defender of the faith, devilishly and maliciously at Sisted aforesaid, on various days and occasions both before and since, maliciously and devilishly bewitched and enchanted a certain Helen Sparrowe, wife of John Sparrowe, in the body of the same Helen, being then great with a certain living child,[25] by reason whereof not only was the same Helen then and there on various occasions gravely vexed in her body horribly troubled, to the greatest danger of her life, but also the aforesaid child (of which the same Helen was then and there great) then and there came to death. And thus the aforesaid jurors say upon their oath that the aforesaid Jane Turnour, in manner and form aforesaid, on the day and in the year aforesaid, at

[24] Two accompanying indictments charged Turnour with having used witchcraft to endanger the lives of an adult woman and a child of seven years.

[25] *infantum vivo*

Stisted aforesaid, maliciously and devilishly bewitched and enchanted the aforesaid Helen Sparrowe, and deprived the living child (of which the aforesaid Helen was then pregnant) of his life by reason of these enchantments and bewitchings, contrary to the form of the statute made and provided for such cases, and to the bad and pernicious example of all other offending in such cases, and against the peace of the said present lady the queen. [Note by the clerk:] Puts herself on the country;[26] guilty judgment.

Entry in the Gaol Delivery Roll of the Essex Summer Sessions and General Gaol Delivery Held at Braintree, July 17, 1581, from C. Ewen, *Witch Hunting and Witch Trials: The Indictments for Witchcraft from the Records of 1373 Assizes Held for the Home Circuit A.D. 1559-1736* 143 (London, 1929)

Joan[27] Turnour: Convicted at the last assizes for witchcraft and reprieved[28] for one year.

Entry in the Essex Lenten Sessions and General Gaol Delivery Held at Chelmsford, March 22, 1582, from C. Ewen, *supra*, at 146

Joan Turnour: Sentenced for witchcraft and reprieved[29] for one year.

Regina v. Sims

75 Eng. Rep. 1075 (Q.B. 1601)

Trespasse and assault was brought against one Sims by the Husband and the Wife for beating of the woman.

Coke [Attorney-General]: The case is such, as appears by examination. A man beats a woman which is great

[26] *I.e.*, accepts trial by jury.

[27] *Johana*, meaning Jane or Joan.

[28] *rep'p*, possibly meaning remanded.

[29] *rep. p.*, possibly meaning remanded.

with child, and after the child is born living, but hath signes, bruises in his body, received by said batterie, and after dyed thereof, I say that this is murder.

Fenner & Popham (J.J.), *absentibus caeteris*, clearly of the same opinion, and the difference is where the child is born dead, and where it is born living, for it be dead born it is no murder, for *non constat*[30] whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the Batteror shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.

Regina v. Webb

Queen's Bench, 1602, Calendar of Assize Rec., Surrey Indictments, Eliz. 1 at 512 (no. 3146) (J. Cockburn ed. 1980)

Surrey. The jurors for our Lady of the Queen present, that Margaret Webb, lately of Godalmyn, spinster, on the tenth day of August, in the forty-first year of the reign of our Lady Elizabeth [1599] by the grace of God Queen of England, France and Ireland, and defender of the faith, with force and arms, and at the aforesaid Godalmyn in the aforesaid county, not having the fear of God before her eyes, but moved and seduced by the instigation of the devil, once ate the poison called "ratsbane" with the intention of spoiling and destroying the infant in the womb of Margaret herself and thus the aforesaid Margaret, by reason of eating the aforesaid poison, spoiled and destroyed then and there the infant in her womb, as a pernicious example to all malefactors offending in like manner, against the peace of our Lady Queen, her crown and dignity.

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[30] It cannot be proved.

Sir Edward Coke, *Third Institute* 50-51 (1644)

If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it was born alive. And the Book in 1 E. 3 was never holden for law. And 3 Ass. p.2 is but a repitition of that case. And so horrible an offence should not go unpunished. And so was the law holden in Bractons time, Si aliquis qui mulierem praegnanem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; & maxime si fuerit animatum, facit homicidium. And herewith agreeth Fleta: and herein the law is grounded upon the law of God, which saith, Quicumque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe Dei creatus est homo. If a man counsell a woman to kill the childe within her wombe, when it shall be born, and after she is delivered of the childe, she killeth it; the counsellor is an accessory to the murder, and yet at the time of the commandement, or counsell, no murder could be committed of the childe in utero matris: the reason of which case proveth well the other case.

Rex v. Anonymous

Bury Assizes, 1670, 1 M. Hale, *History of the Pleas of the Crown* 429-30 (London 1736)

But if a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy the child within her, and therefore he, that gives a potion to this end, must take the hazard, and if it kills the mother, it is murder, and so ruled before me at the assizes at Bury in the year 1670.

Sir Matthew Hale, *History of the Pleas of the Crown* 428-30, 433 (London 1736)

These opinions therefore may serve to caution ignorant people not to be too busy in this kind of tampering with physic, but are no safe rule for a judge or jury to go by: we see the statute of 34 & 35 *H. 8 cap. 8* dispenseth with the penalty of those former statutes, as to outward applications and medicines for agues, stoen, strangury, which may be administered by any person, and the preamble of the statute tells us, that if none but licensed chirurgeons should be used in many cases, many of the king's subjects were like to perish for want of help.

[Here, Hale reported his *Rex v. Anonymous, supra* at B-22.]

And certainly if that opinion should obtain, that if one not licensed a physician should be guilty of felony, if his patient miscarry, we should have many of the poorer sort of people, especially remote from *London*, die for want of help, lest their intended helpers might miscarry.

This doctrine, therefore, that if any dies under the hand of an unlicensed physician, it is a felony, is apochyphal, and fitted, I fear, to gratify and flatter doctors and licentiates in physic, tho it may, as I said, have its use to make people cautious and wary, how they take upon themselves two much in this dangerous employment.

. . .

If a woman be quick or great with child, if she takes, or another gives her any potion to make an abortion, or if a man strike her, whereby the child within her is *kild*, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moses* was punishable with death, nor can it legally be made known whether it were kild or not, *22 E. 3 Coron. 263.* so it is, if after such child were born alive, and baptized, and after die

of the stroke given to the mother this is homicide. *1 E. 3. 23. b. Coron. 146.*

But if a man procure a woman with child to destroy her infant, when born, and the child is born, and the woman in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessary to murder, if absent, and this, whether the child were baptized or not. *7 Co. Rep. 9 Dyer 186.*

Rex v. Beare

(Derby, England, Aug. 15, 1732)

2 The Gentleman's Magazine 931 (Aug. 1732)

ELEANOR MERRIMAN, now the Wife of *Ebenezer Beare*, indicted for a Misdemeanor, in endeavouring to persuade Nich. Wilson to poison his Wife, and for giving him Poison to that End.

Indicted a second time by the Name of *Eleanor Beare, for a Misdemeanor*, in destroying the Foetus in the Womb of *Grace Belfort*, by putting an iron Instrument up into her Body, and thereby causing her to miscarry.

Indicted a third time, for destroying the Foetus in the Womb of a certain Woman, to the jury unknown, by putting an Iron Instrument up her Body, or by giving her something to make her miscarry. Pleaded Not Guilty.

. . .

To the Second Indictment

COUNSEL [FOR THE KING]: Gentlemen, you have heard the Indictment read, and may observe, that the Misdemeanor for which the Prisoner stands indicted, is of a most shocking Nature; to destroy the Fruit in the Womb carries something in it so contrary to the natural Tenderness of the Female Sex, that I am amazed how ever any Woman should arrive at such a degree of Impiety and Cruelty, as to attempt it in such a manner as the prisoner

has done, it has really something so shocking in it, that I cannot well display the Nature of the Crime to you, but must leave it to the Evidence: It is cruel and barbarous to the last degree.

Call *Grace Belfort.*

GRACE BELFORD [sic]: I lived with the Prisoner as a Servant about ten Days, but was not hired, and I was off and on with her about fourteen Weeks: When I had been with her a few Days there came Company into the House, and made me drink Ale and Brandy (which I was not used to drink) and it overcame me; my Mistress sent me unto the Stable to give Hay to some Horses, but I was not capable of doing it, so [I] laid me down in the Stable; and there came to me one Ch——r, a young Man that was drinking in the House, and after some Time I feared I was with Child by Ch——r; upon that, my Mistress asked me if I was with Child, I told her I thought I was; Then she said if I could get 30 shilling from Ch——r, she would clear me from the Child, without giving me Physik. A little Time after, some Company gave me Cyder and Brandy, my Mistress and I were both full of Liquor, and when the Company was gone, we could scarce get up the Stairs, but we did get up; then I laid me on the Bed, and my Mistress brought a kind of an Instrument, I took it to be like an Iron Skewer, and she put it up into my Body a great Way, and hurt me.

COURT: What followed upon that?

EVIDENCE: Some Blood came from me.

COURT: Did you miscarry after that?

EVIDENCE: The next day after I went to *Allesiree*, where I had a Miscarriage.

COURT: What did the Prisoner do after that?

EVIDENCE: She told me the Job was done. I then lodged two or three Nights with one *Ann Moseley* (now *Ann Oldknowles*) and coming one Morning to see the Prisoner, I called for a Mug of Ale and drank it, and told her I was going home; then came in *John Clark*,

and on the Prisoner's saying I was going home, he said he would give me a Glass of Wine to help me forward, which accordingly he did, out of a Bottle he had in his Pocket, then I took my leave of him; and when I was a little Way out of Town, I fell down at a Style, and was not well, I lay a little while, then go up, and went to *Nottingham* that night.

Call *Ann Oldknowles.*

COURT: Do you know any Thing of *Grace Belford* having a Miscarriage?

EVIDENCE: I know nothing, but that when she lay with me, I saw all the Symptoms of Miscarriage on the Bed where she lay.

Call *John Clark.*

COURT: Do you know the Prisoner?

EVIDENCE: Yes, I have frequented her House.

COURT: Did you ever hear her say anything that she had used Means to make a Woman with Child miscarry, by putting any kind of Instrument up their Bodies, or by giving them any Thing to take inwardly?

EVIDENCE: Yes, I have.—

COURT: Have you seen her Instrument for that Purpose, or have you seen her use any Means to make any Woman with Child miscarry?

CLARK: No, but I have heard her say she had done it, and that she then had under her one *Hannah* ————, whose other Name I know not.

COURT: Have you heard her say she had been sent for for these wicked Practices, or had any Reward for causing any one to miscarry?

CLARK: I heard her say she had been once sent for to *Nottingham*, and, as I remember, she said she had five Pounds for the Journey.

PRISONER: Did you not say you never heard me say any thing of using any Means to cause Miscarriage in any Person, or saw me use any Means for that End?

CLARK: No, I said I never saw you do any thing that Way, but had heard you say you had done it. Would you have me forswear myself?

PRISONER: No, but I would have you speak the Truth.

CLARK: I do.

Then the Prisoner called several Persons to speak in her Behalf, but only two appeared, and they only gave her Friends a reputable Character, and said the prisoner had a good Education, but they knew nothing of the latter Part of her Life.

MR. MAYOR: The Prisoner at the Bar has a very bad Character, and I have had frequent Complaints against her for keeping a disorderly House.

Many evidences were ready in Court to have proved the Facts she stood charged with in the third Indictment; but his Lordship observing that the second Indictment was proved so plainly, he thought there was no Necessity for going upon the third.

His Lordship summed up the Evidence in a very moving Speech to the jury, wherein he said, he never met with a Case so barbarous and unnatural. The Jury, after a short Consultation, brought the Prisoner in Guilty of both Indictments, and she received sentence to stand in the Pillory, the two next Market-Days, and to suffer close Imprisonment for Three Years.

Derby, August 18, 1732. This day *Eleanor Beare*, pursuant to her Sentence, stood for the first Time in the Pillory in the Market place; to which Place she was attended by several of the Sheriff's Officers; notwithstanding which, the Populace, to show their Resentment of the horrible Crimes wherewith she had been charged, and the little Remorse she has shown since her Commitments, gave her no Quarter, but threw such quantities of Eggs, Turnips, etc. that it was thought she would hardly have escaped with her Life: she disengaged herself from the Pillory before the Time of her standing was expired, jumped among the Crowd, whence she was with Difficulty carried back to Prison.

Rex v. Tinkler

King's Bench, 1781

Report in the Newcastle Chronicle, Nov. 24, 1781, at 2

Tuesday last Margaret Tinkler, midwife, was executed near Durham, for a crime in acting or recommending certain means to destroy an infant, which was effected; and finally with the death of the mother. Before she left the jail for execution, she confessed to a worthy clergyman, and Mr. Smith, surgeon in Newcastle, then present, that she only recommended the means, but that the act itself was done by the deceased woman . . . [Her plea of pregnancy failed.]

The Published Report, 1 E. East, A Treatise of the Pleas of the Crown 354-356 (1803)[31]

Margaret Tinkler was indicted for the murder of Jane Parkinson, by inserting pieces of wood into her womb. A second count charged her as accessary before the fact. It was proved by several witnesses, that from the first time of the deceased taking to her bed, which was on the 12th of July, she thought that she must die, making use of different expresses, as, *that she was going; that she was working out her last*; and exclaiming, *Oh! that Peggy Tinkler has killed me*. She lingered till the 23d, when she died. She never was up but once during that time, when on telling a friend who attended her that she thought herself better, she advised her to get up, which the deceased did, and walked as far as the passage going out of the room, but was forced to return and go to bed again. It appeared by the testimony of several witnesses, that from the moment of her taking to her bed till the time of her death she had declared, *that Tinkler had killed her and dear child*, (stating the particular means used, which agreed with the charge in the indictment.) And

[31] This report, which is the one by which the case is generally known, has been verified by Dr. Baker against the original records of the case.

during the same period she had declared more particularly, "that she was with child by one P. a married man, who, being fearful lest his wife should hear of it if she were brought to bed, advised her to go to the prisoner, a midwife, to take her advice how she should get rid of the child, being then five or six months gone." "That the prisoner gave her the advice" in question, which she followed accordingly. It was proved by the testimony of a witness, that three days before the delivery, which was on the 10th of July, she saw the deceased in the prisoner's bed-chamber, when the prisoner took her round the waist and shock her in a very violent manner six different times, and tossed her up and down: and that she afterwards delivered at the prisoner's house. The deceased also declared during her illness, that after her delivery the prisoner gave her the child to take home; and bid her to go to bed that night and sleep, and get up in the morning and go about her business, and nobody would know anything of the matter; but that appearing very ill the next day at a relation's house, they had ordered her to go home and go to bed, which she did. The child was born alive, but died instantly; and the surgeons, who were examined, proved that it was perfect. There was no doubt but that the deceased had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes caused by the skewers, one of which was mortified, and the other only enflamed; and other symptoms of injury appeared. A short time before her death she was asked whether the account she had from time to time given of the occasion of her death, and the prisoner's treatment of her were true; and she declared it was. It was objected that the above evidence of the deceased's declarations ought not to be admitted, as she herself was *particeps criminis*, and likewise as it appeared at the time of her declarations she was better, or thought herself so. But Nares J. was of opinion, that however this objection might hold with respect to the second count, in which the prisoner was charged as an accessory to the deceased, yet the deceased

was not willingly or knowingly an accessory to her own death; and therefore it was like the common case of any other murder. And as to the objection that she once thought herself better, and tried to get up, yet the same declarations she then made had been made repeatedly before to persons whom in confidence she told that she never should survive, when she first took to her bed; and she had repeated the same declarations the day before she died, and within a few hours of her death. And as to the fact itself, he was clearly of opinion it was murder on the authority of Lord Hale. The jury found the prisoner guilty on the first count, charging her as a principal in the murder, and execution being respited to take the opinion of the judges on the whole case, they all met to consider of it: and were unanimously of opinion that these declarations of the deceased were legal evidence: for though at one time the deceasd thought herself better, yet the declarations before and after and home to her death were uniform and to the same effect. And as to her being *particeps criminis*, they answered, that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a witness for the crown. And though the practice be not to convict on such proof uncorroborated, yet the evidence is admissible; and here it was supported by the proof of the prisoner tossing the deceased in her arms in the manner stated. Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a *particeps criminis*; as she considered herself to be dying at the times, and had no view or intent to serve in excusing herself, or fixing the charge unjustly on others. But others of the judges thought that her declarations were to be so considered; and therefore required the aid of confirmatory evidence.

APPENDIX D

REPRESENTATIVE EARLY AMERICAN LEGAL MATERIALS RELATING TO ABORTION

Proprietary v. Mitchell

10 Md. Arch. 171-186 (1652)

[The following record of the trial is found at 10 Md. Arch. 182-185; the first part of the report includes extensive depositions as evidence against Captain Mitchell used to prepare the charges, including statements that he had administered a "Phisick" to Susan Warren to induce the abortion of their child.]

The Court this day took into Consideration a Peticon exhibited by Capt. William Mitchell who intended (as it Seems) to have preferred the Same to the Assembly had it gone on; The Peticon being as followeth vizt.:

To the Honble the Assembly for regulateing the affairs of the Province of Maryland:

The humble Peticon of Capt. Wm. Mitchell Humbling Shewing That your Peticoner was on Saturday last comitted prisoner to the Common Gaol upon a Warrant Signed by Robert Brooke Esq., In which your Peticoner Stands charged in general words with Murther, Atheisme, and Blasphemy, Crimes never in the least acted or within the Intention of your Peticoner. Your Peticoner therefore humbly prays he may be Speedily called to his Answer, and have his liberty restored in Case noe crime in Law be proved against him that warrants his Imprisonment upon the warrant before menconed, And that his Natural filing for which God hath pleased to affiict and humble Peticoner, may not be pressed against your Peticoner in Cases wherein the Laws of England are Silent, And your Peticoner Shall ever pray.

[Signed] Wm. Mitchell

Upon reading of which Peticon the Court gave direction for a Speedy tryall whereupon his Lordships Attorney, Mr. Hatton, brought in his charge as followeth, viz.:

May it please this Honble Court: It is fallen to my Lott upon the alteracon in the Government [1] as Attorney to the Lord-Proprietary to be prosecutor against Capt. William Mitchell now prisoner here upon Mr. Brookes Warrant, I could have wished there been no Such occasion, The Crimes for which I am to charge him being Soe many and Soe heynous, that I have not known or heard of the like, It troubles me the rather in regard the Lord Baltemore hath been formerly Soe deceived in him as to place him here in the Seat of Judicature, which by his Scandolous course of life and gross haynous offences, he hath extreamly abused, Whereas he ought (especially Soe placed) to have given good example to others an to imploy that Talent and those abilities of witt and understanding (which almighty God hath indeed in a large measure bestowed on him) to his glory and the publick good, But by Common experience it is apparent, that the chiefest use he hath made thereof hath been to colour over his Villanous Courses, and to mock and deride all Religion and Civil Government, As the Court (in part) take notice by the particulars of his Charge being as followeth Vizt.:

The charge of the Lord Proprietary's Attorney by way of Indictment against Capt. William Mitchell in the name of the Keepers of the Liberties of England by Authority of Parliamt. ffirst: That by his expressions as well as practice (as will as I conceive appear by proofe) he hath not only professed himself to be an Atheist, but hath also endeavoured to draw others to believe there is noe God, Makeing a Common practice by blasphemous expressions

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[1] [Editor's note] Probably a reference to the displacement of the colony's Catholic government by its first Protestant government in 1652. *Worldmark Encyclopedia of the States* 242 (1981).

and otherwise to mock and deride God's Ordinances, and all Religion, thereby to open a way to all wicked lustfull licentious and prophane Courses. Secondly: That he hath Comitted Adultery with one Susan Warren. Thirdly: That he hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren. And is much Suspected (if not known) to have brought his late wife to an untimely end in her late Voyage hitherward by Sea. Ffourthly: That (as I conceive will appear by proofe) he hath Since his late wife's death lived in fornication with his now pretended wife Joane.

And for these and other grosse Crimes and Misdemeanors (sufficiently I conceive) appearing by proofe, My humble request is that the prisoner may be brought to his Answer, and upon a Speedy tryall may receive punishment according to Justice to God's glory and discharge of the Government in that particular.

To which charge the Said Capt. Mitchell the prisoner by his Answer pleading not Guilty, made Choice to be tryed by a Jury Whereupon these persons following were warned to be of the Grand Jury for the tryall vizt: . . . ., who being all particularly called by name and attending the Court, The prisoner being demanded whether he could take any personal excepcon against any of them, expressed that he could not but was well Satisfied therein. Whereupon the Jurors were Sworn and their charge given them to bring in a Just and true verdict upon every branch of the Attorneys Charge aforesaid according to evidence to the best of their Skill who after much time Spend therein brought in their Joynt verdict in the words following vizt.:

Vera[2] to the first Soe far as one Deposition with Sundry Circumstances thereunto agreeing Shall be

[2] [Editor's note] "True bill"—a good indictment.

thought valid in Law. To the Second, third, and fourth: *Billa Vera.*

After the bringing of which verdict the Court discharged the Jurors and the day being far Spent and by reason of other Occasions, the Governor adjourned the Court till the day following.

. . .

Capt. William Mitchell this day referred himself wholly to the determination and Judgement of the Court for all matters charged against him upon which the Grand Jury had given in their verdict the day before not desiring that the Court Should be troubled with impannelling another Jury for the further tryall thereof.

This Court therefore takeing the matter into Serious Consideracon upon the perusal of the proofs and in pursuance of the verdict of the Grand Jury for his Several Offenses of Adultry, fornication and Murtherous intention, and in respect of his lewd and Scandalous Course of life Sufficiently appearing upon the proofs doth Order that the Said Capt. Mitchell Shall forthwith pay ffive thousand pounds of Tobacco and Cask or the value thereof as a ffine to the Lord Proprietary, And to enter into bond for his good behavior. And that he and his now pretended wife Joane be Seperated till they be Joyned together in Matrimony in the usual allowed Manner, And that paying the Court Charges and other ffees and Charges of imprisonment he is to be discharged of his Imprisonment in this particular.

The Midwives' Ordinance

3 Min. of the Common Council of N.Y. 122 (1716)

You [midwives] Shall not Give any Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time.

James Parker, *Conductor Generalis: Or, the Office, Duty, and Authority of Justices of the Peace* 216-17 (1764)

If a physician or surgeon gives a person a potion, without any intent of doing him any bodily harm, but with intent to cure or prevent a disease, and contrary to the physician or surgeon's expectation it kills him, this is no homicide. And lord Hale says, he holds their opinion to be erroneous, who think that if he be no licensed surgeon or physician, that occasioneth this mischance, that then it is a felony. These opinions (he says) may caution ignorant people not to be too busy in this kind of tampering with physick, but are no safe rule for a judge or jury to go by. *1 H.H. 429.*

But if a woman be with child and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy the child, within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother it is murder, [sic]. *1 H.H. 430.*

Also if a woman be quick with child, and by a potion or otherwise, killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder: but if the child be born alive, and dieth of the potion, battery, or other cause, this is murder. *3 Inst. 50.*

Lord Hale says, that in this case it cannot be legally known, whether the child were killed or not; and that if the child die, after it is born and baptized, of the stroke given to the mother, yet it is not homicide. *1 H.H. 433.* And Mr. Dalton says, whether it die within her body, or shortly after her delivery, it maketh no difference. *Dalt. 332.* But Mr. Hawkins says, that (in this latter case) it seems clearly to be murder, notwithstanding some opinions to the contrary. *1. Haw. 80.*

Also it seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill in pursuance of such advice, he is an accessary to the murder. *1 Haw. 80.*

By the *21 J. c. 27.* If a woman be delivered of a bastard child, and she endeavor privately, either by drowning or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; she shall suffer death as in the case of murder, except she can prove by one witness that it was born dead.

The Evolution of New York's Abortion Statutes

Rev. Stat. 1829, Pt. IV, ch. 1, tit. 2, at 550 (New York's first abortion statute)

§ 8: The wilful killing of an unborn child, by any injury to the mother of such child, and which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

§ 9: Every person who shall administer to any pregnant woman with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Rev. Stat. 1829, Pt. IV, ch. 1, tit. 6, at 578 (also part of New York's first abortion statute)

§ 21: Every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever or shall use or employ any instrument or other

means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Note to Rev. Stat. 1829, Pt. IV, ch. 1, tit. 2, § 8, 6 Revisers' Notes 12 (1828)

The killing of an unborn quick child, by striking the mother is now only a misdemeanor . . . . see note to section 10.

Proposed Additional Section for Rev. Stat. 1829, Pt. IV, ch. 1, tit. 2, and Note thereto, 6 Revisers' Notes 13 (1828)

§ 10: The involuntary killing of an unborn quick child, by an injury to the mother pregnant with such child, shall be manslaughter in the same cases, and in the same degree, as if such mother had been killed by such injury.

[Revisers' Note] A child not born, is considered as not being in *rerum natura*, and therefore not subject of murder, so that the killing [of] such a child is not murder or manslaughter.

Note to Rev. Stat. 1829, Pt. IV, ch. 1, tit. 6, § 24 [enacted as § 21], 6 Revisers' Notes 74 (1828)

The last section is founded upon an English statute . . . but with the qualification which is deemed just and necessary. See a note on this subject to § 9, in Title 3, of this Chapter. [Apparently this is a reference to tit. 2, § 9, quoted above, but there is no known Revisers' Note for that section.]

Proposed Additional Section for Rev. Stat. 1829, Pt. IV, ch. 1, tit. 6, and Note thereto, 6 Revisers' Notes 75 (1828)

§ 28: Every person who shall perform any surgical operation, by which human life shall be destroyed or endangered, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for hernia, unless it appear that the same was necessary for the preservation of life, or was advised, by at least two physicians, shall be adjudged guilty of a misdemeanor.

[Revisers' Note] The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice is alarming. The above section furnishes the means indemnity (*sic*), by a consultation, or leaves the propriety of the operation to be determined by the testimony of competent men. This offense is not included among the mal-practices in manslaughter, because, there may be cases in which the severest punishments ought not to be inflicted. By making it a misdemeanor, and leaving the punishment discretionary, a just medium seems to be preserved.

1845 N.Y. Laws, ch. 260, at 285 (New York's second abortion statute)

§ 1: Every person who shall administer to any person pregnant with a quick child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall [in case the death of such child, or of such mother thereby produced] [a] be deemed guilty of manslaughter in the second degree.

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[a] Added by a corrective amendment the next year. 1846 N.Y. Laws, ch. 22, § 1, at 19.

§ 2: Every person who shall administer to any pregnant woman, or prescribe for any such woman to take any medicine, drug, substance or thing whatever, with intent thereby to procure the miscarriage of any such woman, shall, upon conviction, be punished by imprisonment in a county jail, not less than three months nor more than one year.

§ 3: Every woman who shall solicit of any person any medicine, drug, substance, or thing whatever, and shall take the same, or shall submit to any operation, or other means whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail, not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

§ 4: Any woman who shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, which if born alive would by law be a bastard, whether it was murdered or not, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof be punished by imprisonment in a county jail, not exceeding one year.

§ 5: Any woman who shall be convicted a second time of the offence specified in the fourth section of this act, shall be imprisoned in a state prison for a term not less than two or more than five years.

§ 6: Section nine, article first, title second of chapter one, of the fourth part of the Revised Statutes, and section twenty-one, title six, chapter one of the fourth part of the Revised Statutes are hereby repealed.

1872 N.Y. Laws, ch. 181, at 71 (New York's fifth abortion statute)

§ 1: Any person who shall hereafter wilfully administer to any woman with child or prescribe for any such

woman with child or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance, or thing whatever, or shall use or employ, or advise or procure her to submit to the use or employment of any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, or that of such child, shall, in the case the death of such child or such woman be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in a State prison for a term not less than four or more than twenty years.

§ 2: Any woman pregnant with child who shall take any medicine, drug, substance or thing whatever, or shall use or employ, or suffer any other person to use or employ, or submit to the use of employment of any instrument or other means whatever, with the intent thereby to produce the miscarriage of the child of which she is so pregnant, unless the same shall have been necessary to preserve her life or that of such child, shall in case the death of such child be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the State prison for a term not less than four years or more than ten years.

§ 3: Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, substance or thing whatever, or manufacture, advertise or sell any such medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a county jail, or in a State prison, not less than one nor more than three years, in the discretion of the court.

§ 4: Whoever shall unlawfully supply or procure any advice, medicine, drug, substance or thing whatever, know-

ing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not pregnant, shall be deemed guilty of a misdemeanor, and shall upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine, not exceeding one thousand dollars, or by both such fine and imprisonment.

Resolution of the Medical Society of the State of New York,

Feb. 5, 1867

1867 N.Y. Assembly J. 443-44 (Feb. 28, 1867)

Whereas, from the first moment of conception, there is a living creature in process of development to full maturity; and whereas, any sufficient interruption to this living process always results in the destruction of life; and whereas, the intentional arrest of this living process, eventuating in the destruction of life (being an act with intention to kill), is consequently murder; therefore,

Resolved, That this society do express their abhorrence, and deprecate, in a most emphatic manner, the growing increase of that demoralizing aid given and practice rendered in procuring criminal or unnecessary abortion.

Resolved, That this society will hail with gratitude and pleasure, the adoption of any measures or influences that will, in part or entirely, arrest this flagrant corruption or morality among women, who ought to be and unquestionably are the conservators of morals and virtue.

Resolved, That the publication in newspapers, and of secret circulars, of ostensible remedies for female diseases, that suggest abortion, are highly detrimental to public health and morals; and that the Legislature ought, by enactment of a suitable law, to forbid such publications.

Resolved, That a copy of this preamble and resolutions be transmitted to both branches of the Legislature now in session.

Nineteenth-Century Treatises on American Criminal Law

1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* 424-25 (2d ed. 1858)

§ 386. Whether, before the foetus has quickened, an abortion procured with the mother's consent is an offence at the common law, the English books do not distinctly inform us; and the question for England has long been settled by statute in the affirmative. In this country, the tribunals of some of the States have decided in the negative; holding, that, until the woman is quick with child, if she consents, no indictment lies at the common law,—though, if she does not consent, the act is an aggravated assault.[1] The Pennsylvania court, however, discarded this doctrine of the necessity of a quickening; and the learned judge who delivered the opinion remarked with great force: "It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated."[2] If we look at the reason of the law, we shall prefer the Pennsylvania doctrine; because the public and private mischiefs are the same, whether the abortion takes place just before or just after the first movings of the coming human existence are perceptible to the expectant mother. The phrase, "quick with child," has been defined to mean, that the woman has felt the child move within her;[3] and a distinction between this expression and "with quick child," once taken by a learned judge,[4] has been discarded.[5]

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[1] Commonwealth *v.* Parker, 9 Metc. 263; Commonwealth *v.* Bangs, 9 Mass. 387; The State *v.* Cooper, 2 Zab. 52.

[2] Mills *v.* Commonwealth, 1 Harris, Pa. 631, 633, opinion by Coulter, J.

[3] Goldsmith's Case, 3 Camp. 76; Reg. *v.* Phillips, 3 Camp. 76.

[4] Reg. *v.* Wycherley, 8 Car. & P. 262; and see this case for an interesting note by the reporter, showing, on medical authority,

1 Francis Wharton, *A Treatise on the Criminal Law of the United States* 653-658 (5th rev. ed. 1861)

§ 1220. There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder.[e] If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide,[f] even though the child is still attached to the mother by the umbilical cord.[g] It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is quick with child,[h] though such a distinction, it is submitted, is neither in accordance with the result of medical experience nor with the principles of the common law.[j] The civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation; and it is clear that no matter how early a stage he may be appointed executor,[k] is capable of taking as a legatee,[l] or under a marriage settlement,[m] may take

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that "the popular idea of quick or not quick with child is founded in error."

[5] The State *v.* Cooper, 2 Zab. 52, 57; and see the authorities there cited; also Rex *v.* Russell, 1 Moody, 356, 360. See The State *v.* Smith, 32 Maine, 369.

[e] 1 Russ. on Cr. 671; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; 1 Hale, 434; 1 East, P.C. 90; 3 Chitty C.L. 798.

[f] R. *v.* Senior, 1 Mood. C.C. 36; 3 Inst. 50; see ante, § 942.

[g] R. *v.* Trilloe, 2 Moody, C.C. 13.

[h] Com. *v.* Banks, 9 Mass. 387.

[i] W. & S. Med. Jur. § 344-5. Guy's Med. Juris. tit Abortion; 1 Beck. 172, 192; Lewis, C.L. 10.

[j] 1 Russ. on Crim. 661; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; Bracton, 1.3, c. 21.

[k] Bac. Ab. tit. Infants.

[l] 2 Vernon, 710.

[m] Swift *v.* Duffield, 6 Seg. & Rawle, 38; Doe *v.* Clark, 2 H. Bl. 399; 2 Ves. jr. 673; Thelluson *v.* Woodford, 4 Vesey, 340.

specifically under a general devise as a child;"[n] and may obtain an injunction to stay waste.[o] Such also was the effect of a decision on the direct point in Pennsylvania in 1845.[p]

§ 1221. Since the publication of the first edition of this work, the position taken in the text has been the subject of much discussion. [Here follows an extended discussion of *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845), *State v. Cooper*, 22 N.J.L. 53 (1849), and *Smith v. State*, 33 Me. 48, 57 (1851), all of which disagreed with Wharton's conclusion that pre-quickening abortion was a crime at common law, of the medical authorities on human gestation, and of a French treatise on *Médecine Légale* relative to the crime of abortion.]

§ 1226. It appears, then, that quickening is a mere circumstance in the physiological history of the foetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another—that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all—and that it is dependent so entirely upon foreign influences as to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy. There is as much vitality, in a physical point of view, on one side of quickening as on the other, and in a social and moral point of view, the infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards. But if the common law in making foeticide penal, had in view the great mischief which would result from its qualified toleration, *e.g.*, the removal of the chief restraint upon illicit intercourse, and the shock which would thereby be sustained by the institution of marriage

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[n] Fearne, 429.

[o] 2 Vernon, 710.

[p] Com. *v.* Demain, & c., 6 Penn. Law Jour. 29; Brightly, 441.

and its incidents—we can have no authority now for withdrawing any epoch in gestation from the operation of the principle. Certainly the restraints upon illicit intercourse are equally removed—the inducements to marriage are equally diminished—the delicacy as the woman is as effectually destroyed—no matter what may be the period chosen for the operation. Acting under these views, the legislatures of Massachusetts and New Jersey, in order to fill up the supposed gap, passed acts making ante-quickening-foeticide individually penal. If, however, as has been argued, no such gap exists, it will be worth while for the courts of those States which have not legislated on the subject, to consider how far an exploded notion in physics is to be allowed to suspend the operation of a settled doctrine of the common law.

§ 1227. It is remarkable that both in Massachusetts and New Jersey, a leading English case on this point was not referred to, where in an investigation before a jury of matrons, Gurney, B., said, after taking medical counsel, "Quick with child, is having conceived; with *quick* child is when the child is quickened." [c] This view disposes of all the common law authorities against the indictability of the offence.

[Wharton concludued his discussion with a brief comment on certain points about framing an indictment and proving the elements of the crime.]

State v. Moore

25 Iowa 128 (1868)

[The defendant, a practicing physician, was convicted and sentenced to ten years in prison for murder in the second degree by means of medicines administered and instruments used with intent to produce an abortion from which the mother died. The mother was quick with child, but the court did not mention this in its opinion—a point

[c] R. *v.* Wycherley, 8 C. & P. 265.

emphasized some years later in *State v. Harris*, 136 P. 264, 266 (Kan. 1913).]

DILLON, Ch.J.—I. That leading question made by the defendant's counsel is, that, conceding the defendant gave Mrs. Grant medicines and used instruments purposely to produce an abortion, yet, if her death happened therefrom when not intended or contemplated by him, this is not murder, unless it was done by assault or against her will. Substantially this question is presented by the demurrer to the indictment, by the instructions given and refused, and by the motion for a new trial.

Refusing to charge in conformity with the defendant's proposition as above stated, the court on its own motion instructed the jury as follows: "To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. It is known to be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother. Now, the person who does this is guilty of doing an unlawful act. If the death of the woman does not ensue from it, he is liable to fine and imprisonment in the county jail (act March 15, 1858 (Rev. § 4221); and, if the death of the woman does ensue from it, though there be no specific intention to take her life, he becomes guilty of the crime of murder in the second degree. The guilt has its origin in such cases in the unlawful act which the party designs to commit, and if the loss of life attend it as incident or consequence, the crime and guilt of murder will attach to the party committing such an unlawful act."

We have quoted the court's language in order to say that has our approval as being a correct statement of the law of the land. But it is due to the defendant's counsel —whose argument against the correctness of the propositions stated by the court was so distinguished for its fairness, acumen and ability—to notice, and briefly to answer, his objections to this view.

The defendant's counsel concedes, that, tested by the common law rules, the doctrine of the court's charge is correct. In his written brief he says: "It is conceded that at common law the act of procuring an abortion resulting in the death of the mother is murder." But he contends that under the statutes of the State the doctrine does not apply.

In the outset, he calls attention to the fact that the criminal code of the common law has no existence in Iowa, that is, that in Iowa no act, though indictable at common law, can be punished as a crime unless the criminality of such act has been declared or recognized by the statute. *Estes v. Carter*, 10 Iowa, 400. This is followed by the proposition that the act of procuring an abortion was not a criminal offense until made so by the statute of March 15, 1858, reprinted as section 4221 of the Revision. See *Abrams v. Forshee*, 3 Iowa, 278; Hatfield v. Gano, 15 id. 177.

The deduction drawn by him from the above is, that, until the statute of 1858, the act of procuring an abortion was not unlawful, because not specifically made criminal by statute, and, not "being *unlawful*, if death ensues therefrom, it is neither murder nor manslaughter."

He then admits that if the law of murder, as contained in the Revision (§§ 4191, 4192, 4193. 4194), had been enacted at the same time as the law of March 15, 1858 (Rev. § 4221), was passed, or if the statute on the subject or murder had been passed after the act of 1858 (which made criminal the willful procuring of an abortio), that the doctrine of the court's charge would have been correct.

But the statute defining and punishing murder was passed in 1851, and does not, it is argued, *blend* with the subsequent statute of 1858.

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Our view is this: Our statute defines murder in the language of the common law definition of that offense. Compare Rev. § 4191 and 4 Black. Com. 195.

As at common law, *malice*, express or implied, is the essential and distinguishing element of murder. Taking sections 4191 and 4193 together, the proper construction is, that would be regarded as murder under our statute. Section 4192 does not extend or abridge the field of murder, but declares certain specified kinds of homicide to be murder in the first degree, and the next section declares all other kinds of murder (that is, all murder as defined by section 4191) to be of the second degree.

It will be observed that manslaughter is not defined at all, but simply made punishable and the limits of the punishment fixed. Rev. § 4199. It follows that we are remitted to the common law to ascertain what manslaughter is, and it seems also necessarily to follow, that what would be regarded in a common law tribunal as manslaughter would be manslaughter in this State, under our statute.

Inasmuch, therefore, as it is conceded that, at common law, the act charged upon the defendant is murder, the same act is murder in Iowa, and would have been prior to the passage of the act of 1858.

We grant that the present is not a case of express, but of *implied*, malice. In cases of homicide, the settled doctrine of the common law is, that malice may be implied from *unlawful* acts *dangerous* to life, committed without justification. I Bish. Com. Law, § 263; Foster on Hom. 261; *Ann v. The State*, 11 Humph. 159; *Rex v. Martin*, 3 Car. & P. 211; *Commonwealth v. Parker*, 9 Metc. 263-5, per SHAW, Ch.J.

The fundamental proposition of the defendant's argument is, that in Iowa malice cannot be implied from the doing of any act whatever, not what is tendency, unless such act is expressly made a crime by statute.

It would result from this, that if there was not statute in Iowa forbidding persons from putting an obstruction on a railroad track, and one were willfully and purposely put there, causing death, the party doing this act (if he did not intend to produce death) could not be convicted of murder, for the reason that malice (in Iowa) cannot be implied from an act not made unlawful by statute.

In this State, we have no statute specifically forbidding a person in a crowded city from throwing a heavy and dangerous beam from a high buliding, likely to injure and kill passers-by.

At common law, if this be done and death happens, the law would imply malice. But in Iowa, under the doctrine contended for, the party doing an act evincing such an utter and wanton disregard of moral and social duty would not be guilty, even though death be caused thereby, or murder or even manslaughter. These are put by way of illustrations of the consequences of the doctrine maintained by the counsel.

The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being. This protecting, paternal care, enveloping every individual like the air he breathes, not only extends to persons actually born, but, for some purposes, in infants *in ventre sa mere*. 1 Black Com. 129.

The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable. It is no defense to the defendant that the abortion was procured with the consent of the deceased.

The common law stands as a general guardian holding its aegis to protect the life of all. Any theory which robs the law of this salutary power is not likely to meet with favor. Certain it is, that a doctrine leading to such results as these above instanced cannot be sound, and is not defensible.

We hold, therefore, that, in cases of homicide, malice may, as at common law, be *implied* from any act unlawful and dangerous in its nature, unjustifiably committed.

The willful and unnecessary procurement of an abortion is an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child. It is abhorrent to all our notions of sound morality and to all the precepts of our holy religion.

Nearly two hundred years ago Lord HALE laid down the law as follows: "If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it and it works so strongly that it kills her, this is murder; for it was not to cure her of a disease, but unlawfully to destroy the child within her; and therefore, he that gives a potion to this end, must take the hazard, and if it kills the mother it is murder." 1 Hale P.C. 429, 430.

See also *Tinckler's Case*, 1 East P.C. ch. 5, § 16, p. 264, and *Commonwealth v. Keeper, etc.*, 2 Ashm. (Pa.) 227, directly in point; Fost on Hom. 261; *Ann v. The State*, 11 Humph. (Tenn.) 159; *Commonwealth v. Parker*, 9 Metc. 263-5, per SHAW, Ch.J.

And such is the law today and in Iowa. Thus to hold the law to be is not laying a snare for the physician, since his conscience and the sages of that useful and learned profession concur in condemning the practice. By none has the guilt of the offense been more earnestly and persuasively portrayed, and its too great prevalence lamented than by eminent medical writers and teachers.

Under the foregoing view, the willful and unnecessary procurement of an abortion resulting in the unintended death of the woman would have been punishable as murder in the second degree prior to the act of 1858. Of the correctness of his view I entertain no doubt. But instead of resting the decision of the present question upon this

ground, or upon it alone, the court think all possible doubt removed by the act of 1858. The act of 1851, being unrepealed, continued to speak in 1858, and still continue to speak; and has the same force and effect as if it had been passed concurrently with or subsequent to the act of 1858. So that if it were true that malice can only be implied from acts legislatively made criminal, we have even under this view all of the conditions of the offense of murder.

[The court went on to decide adversely to the defendant five technical questions relating to evidence and the charge to the jury.]

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Affirmed.